No. 90-1606

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ATTORNEY GENERAL OF CALIFORNIA,
et al.,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
et al.,

Respondents.

PETITION OF THIRTY-ONE STATE ATTORNEYS GENERAL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The Fifth Circuit's decision in this case raises questions with far reaching constitutional implications: Whether one federal district court can completely disrupt the carefully orchestrated and long standing concurrent jurisdiction shared by state and federal governments in the consumer protection arena, and whether it is permissible for one federal district court to ignore the constitutional limitations on its jurisdiction and, simply because the court wants to "render a meaningful decision," bind, by improperly claiming the ability to exercise personal and subject matter jurisdiction over them, 33 state attorneys general who are not properly before that court.

Specifically, the questions presented are:

1. Is the Federal Aviation Act's preemption of state laws "relating to rates, routes and services" so broad that it shields airlines from state prosecution when, in violation of state law, they deceptively advertise the price of their product within a state?

2. Does a federal district court have the personal jurisdiction necessary to enjoin the possible future law enforcement activity of 33 state attorneys general who never appeared before it and who preserved their objections to jurisdiction in the only documents they submitted to court?

3. Does the mere possibility that one or more states may, at some time in the future, bring an enforcement action against the plaintiff airlines for some future false advertising in which they may engage, present a sufficient case or controversy to afford a federal district

court subject-matter jurisdiction over thirty-four state attorneys general?

The decision of the Fifth Circuit directly conflicts with the Ninth Circuit's holdings in *Air Transport Ass'n v. P.U.C. of California*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988) and *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991) that the words "relating to rates, routes or services," as they appear in the Federal Aviation Act ("FAA") are not to be read so broadly as to preempt state regulation of all airline activity. The Fifth Circuit's opinion further conflicts with the following federal district court decisions which reach the same conclusion as the Ninth Circuit: *New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y. 1989); *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal. 1989); and *Kansas v. Trans World Airlines*, 730 F.Supp. 366 (D.Kan. 1990); and with a decision of the California Court of Appeals which found no preemption of state false advertising laws as applied to airline advertising, *People v. Western Airlines*, 155 Cal.App. 3d 597 (1984), *cert. denied*, 469 U.S. 1132 (1985). Further the Fifth Circuit's decision conflicts with a decision of the Court of Appeals for the District of Columbia Circuit which, similarly indicated that nothing in the FAA, in and of itself, provides a basis for preemption of state actions against an airline to redress an airline's false advertising. *Alaska, et al. v. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below included the following thirty-one state attorneys general (or their predecessors in office) who are also petitioners herein: CHARLES COLE, Attorney General of Alaska; GRANT WOODS, Attorney General of Arizona; DANIEL E. LUNGREN, Attorney General of California; GALE A. NORTON, Attorney General of Colorado; RICHARD BLUMENTHAL, Attorney General of Connecticut; ROBERT A. BUTTERWORTH, Attorney General of Florida; LARRY ECHOHAWK, Attorney General of Idaho; ROLAND W. BURRIS, Attorney General of Illinois; BONNIE J. CAMPBELL, Attorney General of Iowa; ROBERT T. STEPHAN, Attorney General of Kansas; J. JOSEPH CURRAN, JR., Attorney General of Maryland; SCOTT HARSHBARGER, Attorney General of Massachusetts; FRANK J. KELLEY, Attorney General of Michigan; HUBERT H. HUMPHREY, III, Attorney General of Minnesota; WILLIAM L. WEBSTER, Attorney General of Missouri; DON STENBERG, Attorney General of Nebraska; FRANKIE SUE DEL PAPA, Attorney General of Nevada; ROBERT ABRAMS, Attorney General of New York; LACY H. THORNBURG, Attorney General of North Carolina; NICHOLAS J. SPAETH, Attorney General of North Dakota; LEE FISHER, Attorney General of Ohio; ROBERT H . HENRY, Attorney General of Oklahoma; DAVE FROHNMAYER, Attorney General of Oregon; JAMES E. O'NEIL, Attorney General of Rhode Island; MARK W. BARNETT, Attorney General of South Dakota; CHARLES W. BURSON, Attorney General and Reporter of Tennessee; JEFFREY L. AMESTOY, Attorney General of Vermont; KENNETH O. EIKENBERRY, Attorney General of Washington; MARIO J. PALUMBO, Attorney General of West Virginia; JAMES E. DOYLE, Attorney General of

Wisconsin; and JOSEPH B. MEYER, Attorney General of Wyoming.

Additionally, the parties below included Jim Mattox, then Attorney General of Texas, who through his successor in office, Dan Morales, the current Attorney General of Texas, is filing a separate petition for certiorari in this matter; Steve Clark, then Attorney General of Arkansas; James E. Tierney, then Attorney General of Maine; and the respondents, consisting of the original three plaintiffs-Trans World Airlines, Inc., Continental Airlines, Inc., and British Airlines, PLC -- the 10 foreign carriers the district court allowed to intervene -- Air Canada, Compagnie Nationale Air France, Alitalia-Linee Aeree Italiane, S.p.A., El Al Israel Airlines, Ltd., Finnair, Lufthansa German Airlines, Japan Air Lines Company, Ltd., Qantas Airways, Ltd., Scandinavian Airlines System, Viacao Aerea Rio-Grandense (VARIG) -- and Pan American World Airlines, Inc., which was also allowed to intervene.

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PETITION OF THIRTY-ONE STATE ATTORNEYS GENERAL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on January 18, 1991, affirming the district court's

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1. The petitioners herein are the 31 attorneys general identified at page iii, *supra*. Reference to "attorneys general" or "states" or "petitioners" is to these petitioners. Such reference does not include, unless otherwise noted, Dan Morales, the Attorney General of Texas, who is not a petitioner in *this* petition for writ of certiorari. Attorney General Morales is filing a separate petition for writ of certiorari to the Fifth Circuit. Occasional references to "34 attorneys general" include the 33 attorneys general who were made defendants by the district court and the Texas Attorney General. The 14 airline plaintiffs will be jointly referred to as "airlines" or "respondents."

Final Judgment and permanent injunction enjoining 34 sovereign attorneys general from enforcing their own respective state false and deceptive advertising and unfair business practices laws against false advertising by airlines. This decision impermissibly expands the jurisdictional reach of the federal courts at the expense of fundamental states' rights guaranteed under the very framework of our Republic.

The January 18, 1991 Fifth Circuit decision ("January 18 decision"), which was ordered not to be published, bases its affirmance on the original Fifth Circuit decision in this matter (897 F.2d 773; "original opinion") which upheld the granting of a preliminary injunction.[2/] The January 18 decision merely affirms the district court's entry of summary judgment and the permanent injunction. In its entire January 18 decision, the Fifth Circuit cites only one case -- *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981) -- and that for the proposition that an appellate court can "refuse to reexamine in a subsequent appeal of the same case issues which were decided either explicitly or by necessary implication in the prior opinion." (Slip opinion at 4.)

The Fifth Circuit's original opinion held that, "Unlike the district courts in *New York*, *California* and *Kansas*[3/], we believe the history of federal legislation

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2. On October 15, 1990, this Court denied the Attorneys General's petition for writ of certiorari to review the Fifth Circuit's affirmance of the preliminary injunction, which had been converted to a final judgment and permanent injunction on June 1, 1990. In denying the petition, Justice Blackmun noted that he would dismiss the petition as moot. 112 L.Ed.2d 261 (1990).

3. *See New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y. 1989), *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal. 1989) and *Kansas v. Trans World Airlines*, 730

regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only." (897 F.2d 773, 782.) Ignoring those cases and others, the court's decision there was based on its conclusion that even though the subject of the regulation of false advertising of airline fares is nowhere mentioned in 49 U.S.C. section 1305, "it is clear that by enacting section 1305 Congress intended to retain in the federal government, exclusive authority over airline advertising of fares." (*Id.* at 783.)

The Fifth Circuit in their original opinion, created a new legal fiction when they held that by filing a motion of specially appearing states, "the thirty-three attorneys general became *de facto* intervenors." This conclusion was reached even though the express purpose of the filing by the attorneys general was to deny that the district court had personal or subject matter jurisdiction over them.

The district court's final order failed to rule on the attorneys general claim that the district court lacked subject matter jurisdiction over the airlines' claims against them. In its January 18 decision, the Fifth Circuit disposed of the states' argument that the federal court lacks subject matter jurisdiction by stating: "the necessary assumption is that the prior panel found subject matter jurisdiction present. Otherwise, the panel would not have reached the merits and affirmed the preliminary injunction." (Slip opinion at 4.)

F.Supp. 366 (D.Kan. 1990).

OPINIONS BELOW

The January 18, 1991 opinion of the United States Court of Appeals for the Fifth Circuit in case number 90 - 8387 was ordered not to be published and is reprinted in the Appendix at 1a - 6a.

The Final Judgment of the United States District Court for the Western District of Texas was signed on June 1, 1990. The states filed a timely appeal therefrom (case number 90 - 8387). The final judgment is reprinted in the Appendix at 7a - 10a.

The original opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed the preliminary injunction, is reported at 897 F.2d 773, and is reprinted in the Appendix at 11a - 40a.

The initial opinion and order of the United States District Court for the Western District of Texas, which was signed on January 30, 1989, and from which the Texas Attorney General filed an appeal (case number 89-1142), is reprinted in the Appendix at 41a - 43a. On February 27, 1989, the district court signed an order clarifying its order of January 30, 1989. The Clarifying Order is reprinted in the Appendix at 44a.

The district court entered two more orders which broadened the initial order. On April 26, 1989, the court entered an order, reprinted in the Appendix at 45a - 56a, which expanded the preliminary injunction to enjoin the attorneys general who are petitioners herein and allowed ten foreign airlines to intervene as plaintiffs. The January 30, 1989 order and the April 26, 1989, order are reported at 712 F.Supp. 99.

On May 26, 1989, the court signed a further order which is reprinted in the Appendix at 57a. Following timely appeals from each of these orders, the Fifth Circuit consolidated these three appeals for hearing and decision. These three cases form the basis for the original decision reported at 897 F.2d 773.

JURISDICTION

The airlines invoked federal court jurisdiction under 28 U.S.C. section 1331 and 1337. The Court of Appeals for the Fifth Circuit, on January 18, 1991, entered a judgment and an opinion affirming the district court's Final Judgment and permanent injunction. (Appendix at 1a - 6a.) No petition for rehearing was sought. This Court has jurisdiction to review the judgment of the Fifth Circuit pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Federal Aviation Act section 105(a)(1), 49 U.S.C. section 1305(a)(1) [in pertinent part]. Federal preemption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act section 411(a), 49 U.S.C. section 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been

or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act section 1106, 49 U.S.C. section 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

State False Advertising Laws.

The relevant provisions of several state false and deceptive advertising laws are reprinted in the Appendix at 58a - 65a. In general, such state laws prohibit false or misleading advertising or deceptive or unfair practices in the conduct of any trade or commerce.

STATEMENT OF THE CASE

The Fifth Circuit's decision expands federal court jurisdiction beyond constitutional boundaries long established and clearly defined, thus stripping the states of their historic right to enforce, under their police power authority, their false advertising laws against false advertisements placed by airlines. The Fifth Circuit's decision conflicts with previous decisions of several other federal courts, including the District of Columbia Circuit, the Ninth Circuit, several federal district courts and state

courts.[4] By reaching the strained conclusion it did, the Fifth Circuit denied the states their right to protect their citizens from the abuses of deceptive advertisements. In addition, the court's decision creates an industry wide exemption for the airline industry from prosecution for false advertising that Congress neither enacted nor intended. This case presents this Court with the opportunity to settle the conflict created by the Fifth Circuit's decision herein and to return to the states their sovereign right to prosecute false advertising which occurs within their borders.

On January 23, 1989, Trans World Airlines, Inc., Continental Airlines, Inc. and British Airways, PLC commenced this action in the United States District Court for the Western District of Texas. The only named defendant was the Attorney General of Texas. But the complaint sought an injunction to prohibit him *and* others from enforcing the Texas Deceptive Trade Practices Act, *or* any other state law, against airline advertising. The relief sought would have effectively insulated these three airlines from prosecution for false or deceptive advertising by the State of Texas or any other state. The complaint also sought injunctive relief which would "preliminarily and permanently enjoin" the taking of any action against the airlines pursuant to any "state law . . . as they purport to regulate plaintiffs' rates, routes or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services; . . . ." and for a declaration "that implementation or enforcement of . . . Tex. Bus. & Comm. Code §§17.41 et seq. *or any other state law*" (emphasis added) be declared unconstitutional on various grounds. (Complaint, Prayer, paragraph (e), Record on Appeal,

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4. *See* cases set forth at page 13, *infra*.

Docket #1, Vol. 10, pp. 1981-2007.)[5] A hearing on plaintiffs' request for a temporary restraining order ("TRO") was set for January 27, 1989.

Because the airlines' action could be read as a request for an order restricting all states from enforcing their own false advertising laws, 33 states filed a five page "Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Request to Extend Date for Hearing on Temporary Restraining Order." ("Motion of Specially Appearing States;" RA, Dkt #13, Vol. 7, pp. 1536-1543.) The attorneys general filed this Motion, "without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them . . . ." The states asked that the three airlines' request for a TRO be denied because it "could affect the sovereign rights of states which have neither been served nor named as defendants in the instant action," and requested "Time to decide in orderly fashion how and whether to respond . . . ." (*Id.* at 1538-1539.)

At the TRO hearing, Attorney General Robert T. Stephan of Kansas specially appeared on behalf of himself and the State of Kansas to argue the lack of the court's jurisdiction. The district court granted the airlines a preliminary injunction which enjoined the Texas Attorney General (at that time, Jim Mattox) and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

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5. Throughout reference to items in the Record on Appeal to the Fifth Circuit ("RA") will be by docket item number ("Dkt #"), followed by reference to the appropriate volume number ("Vol.") and page cite.

> ". . . initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§ 17.41 et seq., *or any other provision of state law,* which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services." (Appendix at 42a - 43a; emphasis added.)

Because it was unclear whether the preliminary injunction prohibited states other than Texas from enforcing their own state laws, Attorney General Stephan, again acting on behalf of Kansas only, and preserving his objections to the court's personal and subject matter jurisdiction, sought clarification. (RA, Dkt #24, Vol. 7, pp. 1498-1499.) Plaintiffs' counsel confirmed that the attorneys' general apprehension that the airlines were attempting to bind them by their request for a TRO was not misplaced when he "unambiguously advised the Court that plaintiffs were seeking a broader injunction than one just against defendant Mattox by himself." ("Plaintiffs' Opposition to Robert Stephan's Motion to Clarify and Substitute Order;" RA, Dkt #27, Vol. 7, pp. 1455-1470.)

On February 23, 1989, the court issued an order clarifying that the preliminary injunction "does not apply to any state, . . . other than Texas, nor to any law other than the laws of the State of Texas." (Appendix at 44a.) Not to be deterred in their attempt to have a federal district court exercise jurisdiction over attorneys general not within the jurisdiction of the court, on March 16, 1989, the plaintiffs filed a motion to broaden the preliminary injunction to prohibit the 33 states from initiating enforcement actions against them. (RA, Dkt #33, Vol. 7, pp. 1382-1384.) On March 29, 1989, ten additional foreign

airlines[6/] filed a motion for leave to intervene. Except for serving Attorney General Stephan and, of course, then Texas Attorney General Mattox, plaintiffs did not serve these motions on any of the other attorneys general who the airlines sought to have bound by the expanded order.

Attorney General Stephan, again acting on behalf of Kansas only filed a response to the airlines' motion, denying that the district court had subject matter or personal jurisdiction over him. (RA, Dkt #50, Vol. 6, pp. 1181-1204.) The other petitioners herein neither appeared nor filed any documents with the court in response to the airlines' motions, since none was a party nor had any been served and since the district court had only approximately two weeks earlier modified its order to make it clear that the injunction only applied to the Attorney General of Texas and the application of Texas law.

On April 26, 1989, the district court: (1) granted the ten foreign airlines' motion to intervene; (2) granted plaintiffs, pursuant to Federal Rules of Civil Procedure ("FRCP") 19, permission to amend their complaint to add as defendants the 33 attorneys general who had filed the Motion of Specially Appearing States; and, (3) reversing its Order of February 27, 1989, ordered that the preliminary injunction be broadened to include the 33 attorneys general. (Appendix at 45a - 56a.)

On May 26, 1989, the district court consolidated the case of *Texas v. Pan American World Airways, Inc.*, with the action originally filed by TWA, et al., granted Pan Am's motion to intervene in this proceeding, and again expanded the preliminary injunction, this time to include

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6. The airlines which moved and were eventually allowed to intervene as plaintiffs are the ten foreign carriers, not including British Airlines, PLC, identified at page iv, *supra*.

Pan Am within its scope. (Appendix at 57a.) The 33 attorneys general were each served with the airlines' amended complaint. Motions to dismiss were filed claiming, *inter alia*, that the court lacked both personal jurisdiction over these attorneys general and subject matter jurisdiction over the claims asserted by the airlines as against the attorneys general. The district court never held a hearing on these motions but stayed all proceedings pending a ruling by the Fifth Circuit.

On appeal from the granting of the expanded preliminary injunction, the Fifth Circuit affirmed the district court's issuance of the preliminary injunction, concluding that "[49 U.S.C.] §1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising, ..." (897 F.2d at 783; Appendix at 29a.) Unlike the district court, however, the Fifth Circuit did not hold that the attorneys general should be joined in the action under FRCP 19 but rather held "that the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf." (897 F.2d at 786; Appendix at 37a.) Thus, the Court of Appeals found that the district court had personal jurisdiction over the attorneys general so that the injunctive relief could be expanded to cover them. The Fifth Circuit did not, however, make any ruling regarding the claim of the attorneys general that the district court lacked subject matter jurisdiction over each of the airline plaintiffs' claims against each of the attorneys general.

On June 1, 1990, in response to "Plaintiffs' Motion For Judgment on the Pleadings, or For Summary Judgment, and For Entry of Final Judgment," and still failing to hold a hearing on the states' motions to dismiss and jurisdictional challenges, but based upon the original decision of the Fifth Circuit, the district court signed an

order of final judgment and permanent injunction against the 33 states and Texas. (Appendix at 7a - 10a.)

On January 18, 1991 the Fifth Circuit affirmed the granting of the final judgment by the district court. This decision was based on its prior decision upholding the preliminary injunction. (Appendix at 1a - 6a.)

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION THAT CONGRESS INTENDED TO PREEMPT STATES FROM ENFORCING THEIR FALSE ADVERTISING LAWS AGAINST AIRLINES CONFLICTS WITH DECISIONS OF THIS COURT, THE DISTRICT OF COLUMBIA AND NINTH CIRCUITS, AND LOWER FEDERAL AND STATE APPELLATE COURTS

The Fifth Circuit, in upholding the decision of the district court that the states are preempted by the Federal Aviation Act ("FAA") from enforcing their deceptive advertising laws against false airline advertisements, has created a conflict regarding the proper scope of the preemptive effect of the FAA. The conflict created by the Fifth Circuit's decision is of critical importance to: (1) the states' exercise of their sovereign rights under our federal system to create and enforce their own laws, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); (2) the states' interest in a properly functioning federalism where their long-standing exercises of police power are preempted only when Congress makes its intent clear and manifest, *California v. ARC America Corp.*, ___U.S.___, 104

L.Ed.2d 86 (1989) and *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985); (3) the states' substantial interest in maintaining honest marketplaces, *Snapp*, *supra*; and, (4) the states' traditional responsibility to protect their citizens from false and misleading advertising used in their states by sellers, who are attempting to sell goods or services in their states.

Additionally, the Fifth Circuit's ruling diverges significantly from decisions regarding the preemptive effect of the FAA reached by this Court (*see Nader v. Allegheny Airlines*, 426 U.S. 290 (1976)), Courts of Appeal in the D.C. and Ninth Circuits (*see Alaska, et al. v. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991) and *Air Transport Ass'n v. P.U.C. of California*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988)), and district courts in the Second Circuit (*New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y. 1989)), the Third Circuit (*Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. PA. 1982)), the Ninth Circuit (*California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal. 1989)), and the Tenth Circuit (*Kansas v. Trans World Airlines*, 730 F.Supp. 366 (D.Kan. 1990)), as well as appellate courts in California (*People v. Western Airlines, Inc.*, 155 Cal. App.3d 597 (1984), *cert. denied* 469 U.S. 1132 (1985)) and New York (*State by Lefkowitz v. Scottish-American Ass'n, Inc.*, 52 A.D.2d 528 (1st Dept. 1976)).

When this Court faced the issue of the preemptive effect of the FAA in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), the Airline Deregulation Act ("ADA") had not yet been passed, and the preemption language of section 105 (a)(1) (14 U.S.C. section 1305 (a)(1)) therefore could not be reviewed. Yet, notwithstanding the existence of

section 411(a),[7] this Court found no Congressional intent expressed in the FAA to preempt the use of other common law and statutory enactments to regulate deceptive practices by airlines. Except for the Fifth Circuit, courts which have considered section 105 (a)(1) continue to find no Congressional intent to preempt the states' ability to enforce state regulation of the type here in question.[8]

Furthermore, under the logic of the Fifth Circuit's ruling, travel agents, trip promoters and airline ticket consolidators who advertise airfares may argue that the Fifth Circuit's decision is not confined to deceptive advertising by airlines but also preempts states from prosecuting them when they engage in false or deceptive advertising for airline travel. The Court should grant this petition because absent a ruling from this Court on the question of the preemptive effect of section 105, an issue over which the lower courts are split, litigation is likely to arise from the states' continued efforts to enforce their laws.

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7. Section 411 (a) (49 U.S.C. §1381 (a)) grants jurisdiction at the federal level to the federal government to regulate deceptive practices by airlines.

8. The cases cited in note 3, *supra*, and *People v. Western Airlines, supra*, 155 Cal.App.3d 597, each found no express preemption in the ADA and held that causes of action based upon state consumer protection laws and common law rights survived the adoption of §105 (a)(1). In *Alaska, et al. v. DOT, supra*, 868 F.2d 441, the D.C. Circuit was faced with the question of whether the states had standing to challenge action taken under the FAA by the DOT. That court ruled the states' claim of injury by the challenged 1988 DOT action was redressable by it and that the states had standing. Had the D.C. Circuit found that the ADA preempted the states, it could not have so concluded.

II.
THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE FEDERAL AVIATION ACT OF 1958 AND THE AIRLINE DEREGULATION ACT PREEMPT STATE ENFORCEMENT OF STATE FALSE ADVERTISING AND DECEPTIVE PRACTICES LAWS AGAINST AIRLINES WHICH ADVERTISE FALSELY

The Fifth Circuit's decision is fundamentally flawed in that it fails to meet the preemption standard this Court and other federal courts have enunciated repeatedly. In areas where there is a long-standing traditional exercise of the states' police powers, such as consumer protection, preemption can be found only where Congress has made its intent clear and manifest. (*See, e.g., California v. ARC America Corp., supra,* 104 L.Ed.2d 86, 94; *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Automobile Importers of America, et al. v. State of Minnesota*, 871 F.2d 717 (8th Cir. 1989), *cert. denied*, 107 L.Ed.2d 154 (1990); and, *Chrysler Corp. v. Texas Motor Vehicle Comm.*, 755 F.2d 1192, 1205 (5th Cir. 1985).) Thus, to find preemption in a case such as the one *sub judice* an even clearer statement from Congress is required than in a typical preemption case.

Federal regulation of deceptive advertising emanates from section 411 of the FAA (49 U.S.C. § 1381). As first adopted in 1938, it was patterned after section 5 of the Federal Trade Commission Act, 15 U.S.C. section 45. *(See Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).) Historically section 5 of the FTC Act

has been interpreted as coexisting with state laws regulating false advertising and deceptive business practices. *(See, e.g., American Financial Services v. FTC*, 767 F.2d 957 (D.C. Cir. 1985).) Likewise, from its inception, section 411 has been read to supplement, and not preempt, state statutory and common law causes of action used to challenge airline deceptive practices. *(See, e.g., Brunwasser v. Trans World Airlines, Inc., supra*, 541 F.Supp. 1338; *People v. Western Airlines, Inc., supra*, 155 Cal. App.3d 597; and *State by Lefkowitz v. Scottish-American Ass'n, Inc., supra*, 52 A.D.2d 528.) Further, this Court has interpreted the FAA's section 1106 "savings clause" (49 U.S.C. § 1506), as preserving state causes of action which, on the federal level, could be challenged under section 411. (*See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976); *see also West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th. Cir. 1990).)

Section 105 (a)(1) of the FAA (49 U.S.C. § 1305 (a)(1)), was added by the Airline Deregulation Act of 1978. It only preempts state laws "relating to rates, routes, or services" of airlines. The legislative history relating to the addition of section 105 makes clear that Congress' intent was to prevent states from adopting utility type regulations which would require airlines to charge certain prices for certain flights, fly specified routes and provide specified services -- i.e., overbooking compensation, liability for damaged luggage, and charter services. *(See, e.g.*, H.R. Rep. No. 793, 98th Cong., reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860; and H.R. Rep. No. 1211, 95th Cong., reprinted in 1978 U.S. Code Cong. & Admin. News 3737, 3752.)

Nowhere in any Congressional report or in the legislation itself is there mention of the need to change the regulation of deceptive advertising from an activity which permits both a state and federal presence to one which

excludes all but a federal presence.[9] The required "clear and manifest" statement of Congress' intent to preempt states from enforcing their false advertising laws against deceptive advertisements by airlines cannot be found in either the FAA or the ADA. Any relationship between airlines' "rates, routes or services" and the states' enforcement of their false advertising laws against deceptive advertising by airlines is too remote and indirect to fall within Congress' intent, through section 105, to prevent the adoption of utility type regulation by the states. This Court should grant the petition in order to reverse the Fifth Circuit's erroneous finding of preemption.[10]

III.
THE DECISION BELOW THAT THE ATTORNEYS GENERAL BECAME DE FACTO INTERVENORS IS SUPPORTED BY NEITHER THE FACTS NOR THE LAW AND IS AN IMPROPER EXTENSION OF FEDERAL COURT JURISDICTION

Although the Fifth Circuit ruled that the attorneys general subjected themselves to the personal jurisdiction of

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9. By equating the words "relating to" found in section 105 of the FAA with the interpretation given the words "*relate to*" as used in the Employee Retirement Income Security Act of 1974 ("ERISA"), the Fifth Circuit erroneously found that Congress intended to preempt state false advertising laws. In doing so the Fifth Circuit ignored the clear holding of this Court that the meaning of those words as used in ERISA is virtually *sui generis*. (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).)

10. Petitioners adopt and incorporate by reference the argument set forth by the Texas Attorney General in his Petition for Writ of Certiorari to the Fifth Circuit in this matter which conclusively demonstrates that the Fifth Circuit erred in holding that Congress, by adopting section 105, preempted state prosecution of airlines which engage in false advertising.

the district court, it cites no authority for this proposition. The district court haled before it 33 attorneys general who were outside of the court's territorial limits so that it could be the sole court to rule on the applicability of the laws of most states in the Union, and thereby "render a meaningful decision over the issue of whether federal law preempts state action in the matter of airline advertising." (712 F.Supp. at 105; Appendix at 52a.) The desire to render a "meaningful decision" is not a valid reason to ignore the jurisdictional rule requiring properly exercised personal jurisdiction before a court may enter a valid order.[11/] No authority exists to support such an unwarranted expansionist grasping for federal court jurisdiction where none exists. This Court should grant the petition to reverse the finding of personal jurisdiction and ensure that other federal courts will not likewise try to expand their jurisdiction beyond constitutionally established limits.

As this Court recently pointed out in *Burnham v. Superior Court of California,* ____ U.S. ___, 109 L.Ed.2d 631 (1990), "the judgment of a court lacking jurisdiction is void" and state courts can exercise jurisdiction over *absent* defendants "only with respect to suits arising out of the absent defendant's contacts with the state." (*Id.* at 638, 639.)[12/] Likewise, a federal district court has no authority to bind a person over whom it has no jurisdiction.

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11. In fact, the decisions of the district court and the Fifth Circuit do not even agree as to the basis for the exercise of personal jurisdiction over the attorneys general. *See* text at page 19 and note 14, *infra.*

12. Although *Burnham* involved the question of whether due process allowed a state court to exercise jurisdiction over an out-of-state defendant who was served while within the geographical boundaries of the state, the reasoning holds equally true when examining the jurisdictional range of a federal district court.

(Hansen v. Denckla, 357 U.S. 235 (1958).) "Absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits." *(Point Landing, Inc. v. Omni Capitol Int'l LTD.,* 795 F.2d 415, 427 (5th Cir. 1986) (per curiam) (en banc), *aff'd sub nom., Omni Capitol Int'l, LTD v. Rudolf Wolf and Co., LTD.,* 484 U.S. 97 (1987).)

Burnham discusses the traditional bases for exercising personal jurisdiction over a non-resident defendant who is not amenable to physical service within the territorial jurisdictional limits of the court: minimum contacts with the would-be forum state or the doing of acts, directly or by an agent, in the would-be forum state which form the basis of the lawsuit. Under these tests it is clear that none of the attorneys general is subject to service of process under FRCP 4 or the Texas Long-Arm statute (Texas Rule of Civil Procedure 108).[13/]

The prerequisite set forth in FRCP 19 to the non-voluntary joinder of a non-party to an action is that the person sought to be joined be "a person who is subject to service of process." Since none of the attorneys general is subject to service within the territorial boundaries of the district court, petitioners assume that the Fifth Circuit rejected the district court's use of Rule 19 joinder to assert jurisdiction over them[14/] and created its own fiction of *de facto* intervention and waiver of objections to personal

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13. *See* note 20, *infra*.

14. The district court rejected the airlines' "assertions that the additional Attorneys General be *deemed* intervenors," and held "that the proper method of joinder is through Federal Rules of Civil Procedure 19." (712 F.Supp. at 105; Appendix at 52a.)

jurisdiction as its basis for exercising jurisdiction over these petitioners. But this purported basis is equally illusory.[15/]

Petitioners admit that lack of personal jurisdiction can be waived, but the record is clear that in this matter it has not been.[16/] The Fifth Circuit implies that the states

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15. Allowing a district court to take unto itself such wide ranging jurisdictional scope is also impermissible. Aside from the exceptions set forth in FRCP 65, a federal district court does not possess power to enjoin those over whom it has never acquired personal jurisdiction. *Hatahley* v. *United States*, 351 U.S. 173 (1956). No federal district court should have the power to bind all fifty states simply because it is the first to broadly decide an issue. That a single district court should not have such authority is further evidenced by the fact that three other district courts ruled, unlike the district court here, that there is no express preemption of state false advertising laws by §105 of the ADA.

This Court, in a different context, has held that when the government is a party to an action, principles should not be adopted which retard the future development of the law or which prevent more than one district court from ruling on the same issue. (*United States v. Mendoza*, 464 U.S. 154, 160, 163 (1984).) The principles underlying this policy are even more critical when applied to the usurpation of authority by a federal district court which issues an order precluding most state governments from enforcing their own laws.

16. The cases cited by the Fifth Circuit do not support that court's position that the claim has been waived. For example, in *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2nd Cir. 1972), the court established that before one waives the right to object to personal jurisdiction, one must (1) enter a case, (2) make no objection to jurisdiction, and (3) ask the court to act on its behalf in some substantive way. In every document filed by any of the attorneys general in this matter, *in personam* and subject matter jurisdiction have always been contested. A review of the record shows the attorneys general have never evidenced an intent to intervene, have not "participated" in this action in a way which

should have done nothing. (897 F.2d at 786; Appendix at 36a.) Yet, all the attorneys general did was attempt to protect their ability to enforce their state laws by filing a Motion of Specially Appearing States contesting the personal jurisdiction and subject matter jurisdiction of the district court and asking that the court not enjoin them, or in the alternative, grant them more time to respond.

Attorney General Stephan "specially" appeared at the oral argument on the airlines' motion for TRO to represent his state and argue that the court lacked personal jurisdiction over the attorneys general and subject matter jurisdiction over the airlines' claims against these attorneys general. State attorneys general are sworn to uphold the law and are committed to complying with a court order; yet they are also required to enforce the laws of their individual states. Thus, when the original district court order included the broad and ambiguous language quoted at page 9, *supra*, Attorney General Stephan properly sought a clarification of the order to determine whether it included within its bounds other attorneys general and other laws than those of the State of Texas.

If the Fifth Circuit is saying that the attorneys general can be held to have intervened because a single state sought clarification of an order rather than risk enforcing state laws in a way which might be in contempt of that order, then the rules pertaining to intervention

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would waive their jurisdictional objections and have never failed to assert such jurisdictional objections. Thus, the attorneys general did not waive their right to raise these objections.

have been expanded in a way this Court should not allow.[17]

It is hard to fathom the legal basis for the Fifth Circuit's statement that, "It appears to us that the thirty-three attorneys general became *de facto* intervenors . . ." (897 F.2d at 786; Appendix at 37a.) The attorneys general did not voluntarily inject themselves into this controversy. They simply took those few steps they believed necessary to protect their states' sovereignty insofar as it was threatened by a TRO request that sought to enjoin them, without notice, from enforcing their respective state laws.[18] To require them to do nothing, as the Fifth Circuit suggests, places them in a "Catch-22" situation -- if the injunction is issued they may be bound by it, yet if they challenge the court's jurisdiction they may also be bound because the very challenge itself gives the court jurisdiction.

This Court should grant the petition to rule that a finding of personal jurisdiction under these circumstances

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17. The attorneys general assume the Fifth Circuit is not saying that because Attorney General Stephan, when he alone was served with the airlines' motion to expand the injunction, responded to it by contesting the court's personal and subject matter jurisdiction over Kansas, the other attorneys general "intervened" in this action. As pointed out *supra*, page 11, after each of the 33 attorneys general were served with the amended complaint, motions to dismiss were filed which contested both the court's subject matter jurisdiction and its personal jurisdiction over them. Certainly, filing motions to dismiss, as contemplated by FRCP 12, cannot be the basis for finding intervention -- *de facto* or otherwise.

18. As indicated at page 9, *supra*, it became clear during the airlines' argument at the TRO hearing that the concern of the attorneys general who were not named as parties was well founded.

is an affront to our federalist system, and a denial of due process which will not be tolerated. If the Fifth Circuit's decision is allowed to stand, the attorneys general of the various states will, time and again, find themselves subject to the orders of courts which have no personal jurisdiction over them, issued in actions in which they are not named parties, simply because a plaintiff has named a single attorney general as a defendant and challenged a law of the named attorney general's state. This Court must not allow such usurpation of state authority to stand.

IV.
THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER EACH OF THE AIRLINES' CLAIMS AGAINST THE ATTORNEYS GENERAL

A. The Airlines' Complaint Does Not Allege the Necessary Case Or Controversy As To Each Attorney General Defendant So As To Vest Jurisdiction Over Each Of Them In the Federal District Court For the Western District Of Texas.

As to all of the attorneys general, save the attorneys general of California, Kansas, Massachusetts, New York, Texas and Washington, none of the plaintiff airlines has alleged, nor can they allege, that any of the other 28 attorneys general have threatened or initiated any legal action under any of their respective consumer protection statutes against any of the airline plaintiffs. In fact, other than alleging that these other state attorneys general belong to the National Association of Attorneys General ("NAAG"), none of the airlines can allege that any of these 28 attorneys general have done anything which evidences a concrete and definite controversy as between the airlines and these attorneys general. There simply is no case or controversy as between the airlines and these

attorneys general. As such, the airlines' complaint does not meet the requirements of Article III, section 2, necessary to give a federal district court jurisdiction.[19]

The bedrock constitutional prerequisite of an actual, case or controversy, anchored deep in this Court's past decisions, was completely ignored by the Fifth Circuit. A quick review of this Court's historic reminders of the need for justiciability suffices to underscore why this case cries out for review. In *United Public Works v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) plaintiffs sought declaratory and injunctive relief to preclude enforcement of a provision of the Hatch Act. Only one of the plaintiffs

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19. Although the airlines also claim that this action falls within the Declaratory Judgment Act, 28 U.S.C. § 2201, it must be remembered that this act does not, in and of itself, provide a basis for federal question jurisdiction. It enlarged the range of remedies available to federal courts; it did not extend their jurisdictional scope. *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667, 671 (1950). The character of any action which *could* be brought by any of the states is one based on a violation of each state's individual false advertising and deceptive practices act. These are the statutes which would give rise to an action brought by any state. The character of the action is "state law;" the character of the airlines' defense to any such state action, as it is in this declaratory relief action, may be federal preemption or various provisions of the Constitution, but that does not give the federal courts original jurisdiction over this type of action. As the Court noted in *Franchise Tax Board v. Construction Laborers' Vacation Trust,* 463 U.S.1 (1983), at 16, "*Skelly Oil* has come to stand for the proposition that, if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a State created action, jurisdiction is lacking." The sole basis the airlines asserted for jurisdiction in the district court was that their defenses to the "actual or threatened" state law actions raise federal questions. For the lack of subject matter jurisdiction in fact, the airlines are seeking to substitute use of the Declaratory Judgment Act. This Court should not allow such a misuse of the Declaratory Judgment Act.

had violated the challenged provision. As to the others, this Court held their various constitutional claims were simply not justiciable and underscored its insistence that "[f]or adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." In denying the other plaintiffs' claims, this Court stated that "the general threat of possible interference with constitutional rights if specified things are done by appellants, does not make a justiciable case or controversy." (*Id.* at 89; *see also International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954).)

No justiciable case or controversy has been established by each of the plaintiff airlines in their complaint vis-a-vis each of the attorneys general. As to all states and the foreign airline intervenors, save Lufthansa, there has been no contact regarding specific advertisements of those airlines nor is any alleged in the amended complaint. As to the 28 state attorneys general, the lack of a case or controversy is unmistakably clear. Plaintiffs do not, and cannot, allege that any of them have filed or threatened to file enforcement actions against any of the airlines based upon the manner in which they advertise. This Court should grant the petition to reverse the decision of the Fifth Circuit and reaffirm the fundamental constitutional bounds of federal court jurisdiction: no jurisdiction exists absent subject matter jurisdiction.

B. There Is No Subject Matter Jurisdiction Over The Claims Each Airline Has Made Against Each Attorney General.

Although the Fifth Circuit recognized that subject matter jurisdiction cannot be waived, the decision of that court, as well as the decision of the district court, fails to address the petitioners' claim that the district court lacked

subject matter jurisdiction to hear the airlines' complaint against the attorneys general. In previously establishing the need to find subject matter jurisdiction, this Court in *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936), stated:

> "It is incumbent upon the plaintiff properly to allege the jurisdictional facts . . . [J]urisdictional facts [must] be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence." (*Id.* at 182, 189.)

The attorneys general have put into issue all of the airlines' material allegations as they relate to subject matter jurisdiction.[20/] Since a factual attack on the court's

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20. In order to contest the district court's exercise of personal jurisdiction and to place in issue the question of its subject matter jurisdiction, a number of attorneys general and assistant attorneys general filed, in conjunction with motions to dismiss the airlines' amended complaint (RA, Dkt.# 161-164), affidavits challenging the existence of such jurisdiction. The affidavits deny the allegations that former Texas Attorney General Mattox acted as the agent of any other attorney general, that any of these attorneys general sought to enforce the NAAG Guidelines rather than their own state laws, that these states have interpreted any state law or tried to enforce any state law other than their own, that these attorneys general acted "in concert" with Attorney General Mattox or one another to enforce the NAAG Guidelines or the laws of any state, that the attorneys general acted "in concert" with Attorney General Mattox to enforce Texas law, and, as appropriate, deny that the offices of these attorneys general have "threatened," "pressured," or "coerced" any of the plaintiffs to comply with the NAAG Guidelines. They further affirmatively allege that they have not done business in Texas, have not consented to personal jurisdiction in Texas, have had no contacts with Texas regarding the subject matter of this lawsuit and have

subject matter jurisdiction "challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, . . . matters outside the pleadings, such as testimony and affidavits, are considered." *(Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir. 1980), *cert. denied,* 449 U.S. 953 (1980).) When dealing with a "factual attack" under FRCP 12 (b)(1), the "plaintiff bears the burden of proof that jurisdiction does in fact exist." (*Id.,* citations deleted.) In this matter, the airlines cannot establish that subject matter jurisdiction exists vis-a-vis all of their claims. The alleged "concerted" conduct of the attorneys general, the underpinning of plaintiffs' entire case, has been denied by the filed affidavits and the record contains no other evidence on which to establish subject matter jurisdiction as to all of the attorneys general.

It was thus incumbent upon the district court and the Fifth Circuit to require plaintiffs to bear the burden of proof to show that jurisdiction exists. Until they were able to do so, the district court should not have expanded the injunction to include the attorneys general within its scope, and should not have granted the ten foreign airlines the right to intervene.

As a result, the Fifth Circuit, without making a finding of subject matter jurisdiction as to each claim by each plaintiff airline against each defendant attorney general, improperly affirmed the district court's orders and impermissibly extended the authority of the federal district court.[21/] This Court should make it clear that on this

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not caused any harm to anyone in Texas.

21. The result of this lack of a ruling on the subject matter jurisdiction question produces the following anomaly. Plaintiffs El Al Israel Airlines and Finnair can apparently set forth, in the

threshold issue of fundamental constitutional dimensions the airlines cannot overcome this impediment. Without subject matter jurisdiction no judgment rendered by a federal court can stand.

C. Because There Is No Subject Matter Jurisdiction The District Court Improperly Granted the Airlines' Motion for Summary Judgment.

The party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to *any* material fact in the case (*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). In reviewing the decision granting summary judgment, a court of appeals is to determine *de novo* whether there is any genuine issue of material fact. (*United States v. Merchants National Bank of Mobile*, 772 F.2d 1522, 1524 (11th Cir. 1985).)

The Fifth Circuit failed to do so. The attorneys general in their motions to dismiss raised a number of factual and legal issues which directly dispute the allegations in the airlines' amended complaint. The lower court never held a hearing on these factually disputed issues. It must be emphasized that there has been *no* discovery in this matter whatsoever. The preliminary injunction was issued following a non-evidentiary hearing

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United States District Court for the Western District of Texas, a valid claim against the attorneys general of Nebraska or Iowa when neither airline flies into or out of Nebraska or Iowa and neither airline has ever been contacted by the attorney general of either state about their advertising. In the reverse situation, however, there would be no subject matter jurisdiction if those attorneys general sued El Al or Finnair in the Western District of Texas claiming they violated Nebraska's or Iowa's deceptive advertising laws by publishing deceptive advertisements in the Western District of Texas, but not in Nebraska or Iowa.

on the original three plaintiffs' request for a temporary restraining order against the State of Texas. This hearing took place four days after the action was filed. The district court not only denied a request for additional time to prepare for the TRO hearing but on its own motion, converted the TRO hearing to a preliminary injunction hearing. At that time, only Texas was a named party. This was the only hearing which was ever held in the district court. The issues raised in the motions to dismiss were neither plead nor argued at that hearing.

The legal issue decided by the Fifth Circuit in its original opinion, that preemption of state deceptive practices acts exists vis-a-vis airline deceptive advertising, did not decide the question of the federal court's jurisdiction. The mere statement in the January 18, 1991, decision alluding to a presumption of preemption (Appendix at 5a) cannot be the basis of federal court jurisdiction when the attorneys general have affirmatively contested that very issue and have sought an evidentiary hearing to resolve this issue. The district court here should not have granted plaintiffs' motions because proper evidence had not yet been adduced, and petitioners should have been allowed to bring out the evidence necessary to show the court's lack of jurisdiction.[22/] The Fifth Circuit compounded that fundamental error by upholding the

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22. For example, the district court should have determined, at a minimum: (1) if it had subject matter jurisdiction over each specific plaintiff airline's claims as they relate to each specific state, including claims by each airline raised against states that have never contacted the airline, or have never threatened state law enforcement action against those airlines or states where those airlines do not operate or advertise; and (2) if the amended complaint, as required by Article III, section 2 of the Constitution, sets forth facts sufficient to establish a case or controversy between each airline named as a plaintiff and each state named as a defendant.

issuance of the Final Judgment on a motion for summary judgment. This Court should grant this petition to make clear that when a federal court's jurisdictional basis is challenged, that court must resolve the challenge before it can legitimately enter a final judgment.

CONCLUSION

The above thirty-three petitioning states, by their respective Attorneys General, respectfully request this Court, for the above reasons, to return to core constitutional principles of federalism and jurisdiction by granting this petition for writ of certiorari and subsequently reversing the decision below.

DATED: April 16, 1991

Respectfully submitted,

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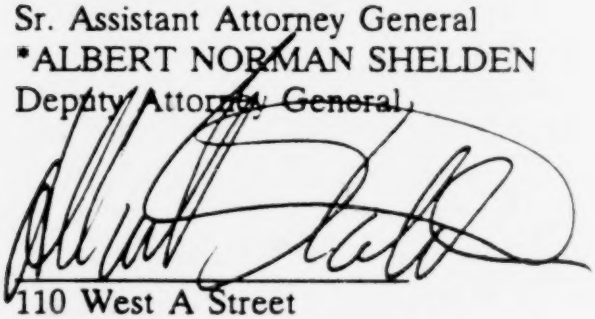

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8387
Summary Calendar

TRANS WORLD AIRLINES, INC., et al.

Plaintiffs-Appellees,

versus

JIM MATTOX, Attorney General of
the State of Texas, et. al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(CA A 89 CA 67)

(January 18, 1991)

Before JOHNSON, SMITH and WIENER, Circuit Judges.

PER CURIAM:[1]

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Defendants[2/] appeal from the district court's grant of Plaintiff's motion for summary judgment and the imposition of a permanent injunction. Finding no error, this Court affirms.

I. FACTS AND PROCEDURAL HISTORY

The background facts for this appeal are thoroughly explained in the prior consolidated appeal of this action. See *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990). In the prior appeal, a panel of this Court affirmed the district court's issuance of a preliminary injunction. It is necessary here only to note one significant factual event which occurred subsequent to the prior appeal. The district court, after considering this Court's prior opinion, granted summary judgment in favor of Plaintiffs and permanently enjoined the Defendants "and all other parties acting in concert or participating with the Defendnts [sic] or on their behalf, and all other persons having actual knowledge of this order" from initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

Defendants timely appealed.

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2. Defendants are attorneys general from the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

II. DISCUSSION

Defendants advance the following issues in this appeal:

1. Did the district court abuse its discretion by enjoining thirty-four sovereign state attorneys general (including Texas) from enforcing their individual state laws in a case where the district court lacks jurisdiction over the claims of each airline plaintiff because there is no case or controversy?

2. Did the district court abuse its discretion by enjoining these state attorneys general because the court lacked subject matter jurisdiction in fact over these attorneys general?

3. Did the district court abuse its discretion in granting the airlines' request for declaratory relief when it had no independent basis to exercise jurisdiction over the attorneys general?

4. Did the district court abuse its discretion by granting plaintiffs' motion for summary judgment or judgment on the pleadings when the record discloses that material questions of fact exist?

5. Did the district court abuse its discretion by never requiring plaintiffs to respond to each of the issues raised by the thirty-three states' motions to dismiss the amended complaint, never ruling on said motions, never allowing the states the right to answer the amended complaint and never allowing the states the right to develop through discovery facts to contradict plaintiffs' allegations regarding the claimed subject matter jurisdiction of the district court over each and every one of the state attorney general defendants?

6. Did the district court abuse its discretion by extending the scope of its final judgment and permanent injunction to include within its purview "all other persons having actual knowledge of this order"?

7. Did the district court abuse its discretion by permanently enjoining thirty-three sovereign state attorneys general over whom it lacks personal jurisdiction from enforcing their own state false and deceptive advertising and practices laws?

8. Did the district court abuse its discretion by permanently enjoining thirty-three attorneys general as to whom it has no jurisdiction because venue, as to these attorneys general, is not proper in the Western District of Texas because non of them reside in that district and, as to them, the claim, if any, did not arise in that district?

9. Did the district court abuse its discretion by permanently enjoining thirty-three sovereign attorneys general who were improperly held to be parties to the action because the district court does not have personal jurisdiction over these attorneys general?

10. Did the district court abuse its discretion by enjoining thirty-four sovereign state attorneys general from enforcing their state laws prohibiting false and deceptive advertising and practices against false airline advertising because it held that the states were preempted from so enforcing their laws by the terms of 49 U.S.C. section 1305(a)(1)?

11. Did the district court abuse its discretion by extending the permanent injunction to include intervenor Pan Am within its scope?[3]

For the reasons set forth below, this Court finds no abuse of discretion on any of these listed issues.

Under the law of the case doctrine, an appellate court can refuse to reexamine in a subsequent appeal of the same case issues which were decided either explicitly or by necessary implication in the prior opinion. *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981). While use of the law of the case doctrine is not mandatory, a court is more likely to apply the doctrine when the prior opinion was apparently well-considered, as in the instant case. Defendants concede that the prior opinion, reported at 879 F.2d 773, became the law of the case with respect to the issued listed above as issues 7 through 12. This Court agrees and will not reexamine issues 7 through 12. The law of the case doctrine also applies to other issues as well. In issue 1, Defendants claim that the district court lacked subject matter jurisdiction because of the lack of a case or controversy. Defendants' arguments on this issue are substantially the same as made in the prior appeal. While the prior opinion does not explicitly discuss it, the necessary assumption is that the prior panel found subject matter jurisdiction present. Otherwise, the panel would not have reached the merits and affirmed the preliminary injunction. This same rationale applies to the jurisdictional issue presented in issue 3. Defendants' arguments in the prior appeal on this issue were substantially the same and the panel implicitly found subject matter jurisdiction.

Issues 2, 3, and 5 reflect essentially the same argument. Defendants contend that the district court erred

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3. The discussion refers to the issues as here numbered.

in granting summary judgment because there were unresolved fact issues. Defendants have failed to point out any outstanding factual issue relevant to the judgment. The question of preemption, the cornerstone of the case, is a question of law which the district court could clearly resolve on the basis of the summary judgment evidence available. Further, Defendants' contention that there were unresolved fact issues necessary to determine the existence of subject matter jurisdiction is without merit. As discussed above, the prior panel evidently found subject matter jurisdiction without the need to resolve any fact issue.

Finally, Defendants argue in issue 6 that the permanent injunction is overly broad by encompassing "all other persons having actual knowledge of this order." The injunction clearly applies to Defendants and Defendants do not contend otherwise. This Court need not decide whether such language is overly broad, however, since Defendants have no standing to assert the rights of hypothetical third parties.

III. CONCLUSION

This Court finds no reversible error. The district court is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS, PLC, ET AL., Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067 (consolidated)
JIM MATTOX, ATTORNEY GENERAL, STATE OF TEXAS,ET AL., Defendants.	§	

FINAL JUDGMENT

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and after careful consideration of the Amended Complaint, the opinion of the United States Court of Appeals for the Fifth Circuit in Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990), Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment, the Defendants' response thereto, and the arguments of counsel, the Court finds that Plaintiffs will suffer immediate, irreparable and continuing injury if the attorneys general of the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, or parties in concert or participating with them, are permitted to bring enforcement

actions against Plaintiffs, or any of them, pursuant to their respective states' laws, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other promotional and informational advertising.

The Court finds and declares that the Defendants have committed acts as set forth in Plaintiffs' Amended Complaint, and will continue to do so unless restrained by this Court; that there is no genuine issue of material fact; that Plaintiffs are entitled to judgment as a matter of law; that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been pre-empted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1305(a)(1); that subsection 2.5 of the NAAG Guidelines, which purports to require that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and that continual threats of enforcement actions by the Defendant attorneys general and others in concert or participating with them would violate the Supremacy Clause of the United States Constitution. The Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendants and, in fact, would be in the public interest.

The Court further finds it unnecessary to decide whether the threatened implementation or enforcement of the NAAG Guidelines through state law by the defendant attorneys general, or by others in concert or participating with them through their respective states' laws, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the interstate compact clause (Art. I, § 10, cl. 3, U.S. Constitution); or violates Plaintiffs' First Amendment rights. Accordingly, it is

ORDERED that Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment is GRANTED. It is further

ORDERED that the Attorneys General of the States of

Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, both individually and in their official capacities, their agents, servants, employees, and all other persons acting for the defendants in either capacity, and all other persons acting in concert or participating with the Defendants or on their behalf, and all other persons having actual knowledge of this order be and hereby are permanently enjoined from:

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

It is further

ORDERED that this injunction will operate prospectively only and will not act to interfere with the continuation of the following pending proceedings:

A. Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on march 9, 1989. This action was subsequently removed to Federal District Court for the Southern District of California which has since remanded this matter to the San Diego County, California Superior Court.

B. Cause No. 89-41703, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the New York Supreme Court, New York County, on March 29, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

C. Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989. This action was subsequently removed to Federal District Court for the District of Kansas which has since remanded this matter to the Shawnee County, Kansas District Court.

D. Cause No. 89 CIV 2425 Pan American World Airways, Inc. v. Robert Abrams, as Attorney General of the State of New York, filed by Pan American World Airways, Inc. in the Southern District Court of New York on April 11, 1989.

E. Cause No. 89-42223, The People of the State of New York, ex rel Robert Abrams v. Pan American World Airways, Inc., filed by Attorney General Robert Abrams in New York Supreme Court, New York County on April 20, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

It is further

ORDERED that Plaintiffs shall recover of the Defendants the costs of this action.

SIGNED this 1st day of June, 1990.

/s/ Walter S. Smith Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, Defendant-Appellant.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

Pan American World Airways, Intervening-Plaintiff-Appellee,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants

Nos. 89-1142, 89-1509 and 89-1610.

United States Court of Appeals, Fifth Circuit.

April 3, 1990.

Appeals from the United States District Court for the Western District of Texas.

Before LIVELY,* JOLLY and HIGGINBOTHAM, Circuit Judges.

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* Circuit Judge of the Sixth Circuit, sitting by designation.

LIVELY, Circuit Judge.

The dispositive question in these consolidated appeals is whether state laws proscribing deceptive advertising are preempted by federal law when the state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Three separate appeals were consolidated for oral argument. We refer to the cases by their Court of Appeals numbers.

In number 89-1142, the Defendant-Appellant is Jim Mattox, the Attorney General of Texas. The Plaintiffs-Appellees are Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental) and British Airways, PLC (British Air).

In numbers 89-1509 and 89-1610, the Defendants-Appellants are the attorneys general of Texas and thirty-three other states. The Plaintiffs-Appellees are TWA, Continental, British Air, Pan American World Airways, Inc. (Pan Am) and ten other airlines.

We affirm the orders appealed from in each of the three appeals.

I. *Background*

A. History of Proceedings

Number 89-1142:

In December 1987, the National Association of Attorneys General (NAAG) adopted guidelines related to airline advertising. The guidelines provide that any fuel, tax or other surcharge to air fare must be included in the total advertised price of the fare. The guidelines are not law.

On November 14, 1988, the attorneys general of Texas and four other states sent letters to TWA, Continental and British Air, notifying them that some of their advertisements

violated the NAAG guidelines and these states' false advertising and deceptive practices laws. The letters charged that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees.

In particular the Attorney General of Texas stated that the airlines had violated the Texas Deceptive Trade Practices Act. The Attorney General advised the airlines that advertising a specific amount for a fare was deceptive if the advertised amount did not reflect the true cost of travel because certain surcharges had not been included in the advertised fare. The letter threatened prosecution.

In January 1989, TWA, Continental and British Air filed suit in the United States District Court for the Western District of Texas to enjoin the Attorney General of Texas from enforcing the Texas Deceptive Trade Practices Act against their advertising. Following a hearing, the district court granted a preliminary injunction. 712 F.Supp. 99. The court found it probable that the plaintiffs would prevail in establishing their claims that any state regulation of advertising related to the airlines' rates, routes and services had been preempted by federal law. The injunction forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, "which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services." The district court later clarified its injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas. In number 89-1142, the Attorney General of Texas appeals from the order granting the preliminary injunction.

Number 89-1509:

On March 16, 1989, the plaintiffs TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who had appeared in a hearing in number 89-1142.

On April 27, 1989, the district court issued an order granting the motions of ten other airlines to intervene as plaintiffs. The court also granted the plaintiffs permission to amend their complaint to add as defendants the attorneys general of the thirty-three other states who had appeared in the action. The court then broadened the preliminary injunction to include the attorneys general of the other thirty-three states.

The district court noted that since the injunction had been issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am. The broadened injunction acted prospectively and did not affect these pending state court cases against TWA and Pan Am. The thirty-four attorneys general appeal this broadening order in number 89-1509.

Number 89-1610:

After the Attorney General of Texas sued Pan Am in state court, charging deceptive practices, Pan Am removed the case to the United States District Court for the Northern District of Texas. Attorney General Mattox objected to removal to federal court and moved to remand the case to state court. His motion was denied. This case was then transferred to the United States District Court for the Western District of Texas. On May 30, 1989, the District Court for the Western

District consolidated this removed case with number 89-1509. The court issued an order granting Pan Am's motion to intervene in number 89-1142 and broadening the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The thirty-four state attorneys general appeal this order of the district court in number 89-1610.

B. Brief Overview of Federal Regulation (and Deregulation)

The framework for federal regulation of civil aviation was set forth in the Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938). This statute created the Civil Aeronautics Authority, whose name was changed to the Civil Aeronautics Board (CAB) in 1940, and vested it with broad powers to regulate commercial aviation. Included in that portion of the statute dealing with economic regulation was section 411, which gave the Authority the power to determine if any carrier engaged in unfair or deceptive practices or unfair methods of competition. *Id.* at 1003. The statute also contained a savings clause in section 1106, which stated that nothing contained in the Act would "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." *Id.* at 1027.

The Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731 (1958) (the Act), continued the CAB and created the Federal Aviation Agency (FAA). The Act reenacted section 411 as it appeared in the Civil Aeronautics Act of 1938, except for substitution of "Board" for "Authority." It also reenacted section 1106, which provided that other common law and statutory remedies remained viable.

Congress enacted the Airline Deregulation Act in 1978. Pub.L. No. 95-504, 92 Stat. 1705 (1978) (Deregulation Act). The purpose of this statute was to encourage and develop an

air transportation system that "relies on competitive market forces to determine the quality, variety, and price of air services." *Id.* The Deregulation Act directed the CAB to consider a number of factors to be in the public interest, including "[t]he prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation." *Id.* at 1706. The Deregulation Act did not change sections 411 or 1106 of the existing statute, but did add a federal preemption provision. Section 105 stated that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Id.* at 1707-08.

The House Committee on Public Works and Transportation noted that "[e]xisting law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts. . . ." H.R.Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3737, 3751-52. The Committee intended section 105 to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." H.R.Rep. No. 1211 at 16; 1978 U.S.Code Cong. & Admin.News at 3752.

The Deregulation Act also contained "sunset provisions" terminating some of the CAB's authority and transferring some authority to the Department of Transportation (DOT) and other federal departments. The sunset provisions neither terminated nor transferred the CAB's authority under section 411.

In 1980, Congress amended section 102 of the Act by adding a more comprehensive treatment of matters to be considered in the public interest. This treatment contains a new emphasis on "maximum reliance on competitive market forces and on actual and potential competition" to achieve the goals of safe, efficient and economic air transportation. Pub.L. No. 96-192, 94 Stat. 35 (1980). However, since 1938 it has been in the public interest for the CAB to promote adequate, economical and efficient air service without unfair or destructive competitive practices. 52 Stat. 980; 49 U.S.C.App. § 1302(a)(3). And, since 1978 "the prevention of unfair, deceptive, predatory or anticompetitive practices" has been in the public interest. 92 Stat. 1706; 49 U.S.C.App. § 1302(a)(7).

Finally, Congress enacted the Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (1984) (Sunset Act). This law terminated or transferred the remaining functions of the CAB and provided for its demise. Sections 411 and 1106 of the original Act were neither terminated nor transferred. However, the Sunset Act contained a provision that all authority of the CAB neither terminated on or before January 1, 1985, nor otherwise transferred, was transferred by law to DOT. *Id.* at 1704. The Sunset Act made no material changes in sections 105 and 411, the preemption provision and the section dealing with "unfair or deceptive practices or unfair methods of competition," respectively. They are codified now as 49 U.S.C.App. §§ 1305 and 1381. Section 12 of the Sunset Act added savings provisions that continued in effect all rules, regulations, orders and determinations of the CAB and gave the same authority as held by the CAB to any agency to which CAB functions were transferred. These provisions are codified now as 49 U.S.C.App. § 1556. It also retained section 1106, now codified as 49 U.S.C.App. § 1506.

The House Committee on Public Works and Transportation noted that there was a need to clarify the status of some of the CAB's authority after sunset. H.R.Rep. No. 793, 98th Cong., 2d Sess. 1, 3 (1984), *reprinted in* 1984. U.S.Code Cong. & Admin.News 2857, 2859. The sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices. H.R.Rep. No. 793 at 3; 1984 U.S.Code Cong. & Admin.News at 2859. The Committee concluded that this important authority should be continued and should be exercised by DOT. H.R.Rep. No. 793 at 4-6; 1984 U.S.Code Cong. & Admin.News at 2860-62. The following passages in the report are of particular interest:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

> The Committee has determined that the Department of Transportation is the most appropriate agency to administer CAB's consumer protection and unfair competitive practice authorities. Under the ADA, DOT will get CAB's authority to protect consumers and competitors insofar as international aviation and essential air service (EAS) are involved, and it would be confusing and inefficient to have DOT protect consumers and carriers in international and EAS operations, and another agency, such as FTC, protect consumers and carriers in other domestic operations. Airline flights frequently are not limited to one of these categories. Some airline flights provide both essential air transportation and other domestic transportation and other flights provide both domestic and international

> service. If two agencies shared authority for consumer protection, the rules could shift in mid-flight.

H.R.Rep. No. 793 at 6; 1984 U.S.Code Cong. & Admin.News at 2862. The concerns expressed by the Committee with respect to divided authority by more than one federal agency would appear equally valid with respect to a division of authority between the federal government and the states.

II

The Supreme Court has considered claims of preemption in many contexts, and has developed an analytical framework for deciding such claims. The Court recently wrote:

> The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 383 [103 S.Ct. 1905, 1912, 76 L.Ed.2d 1] (1983). See also *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-154 [102 S.Ct. 3014, 3022-3023, 73 L.Ed.2d 664] (1982). A pre-emption question requires an examination of congressional intent. *Id.*, at 152 [102 S.Ct., at 3022]. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 [103 S.Ct. 2890, 2898-2899, 77 L.Ed.2d 490] (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). Finally, even where Congress has not

> entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248] (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941).'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 [107 S.Ct. 1419, 1425, 94 L.Ed.2d 577] (1987), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 [104 S.Ct. 615, 621, 78 L.Ed.2d 443].

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988). See also, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir.1985).

We look first to see if state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines. It will be necessary to consider preemption by implication only if we find no express preemption.

A.

The airlines contend that section 105(a)(1) of the Act expressly preempts state laws pertaining to the advertising of fares by airlines. Section 105, as noted, was added to the Act in 1978 by the Deregulation Act. Section 105(a)(1), states:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or

> services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

49 U.S.C.App. § 1305(a)(1) (1988). The exception in paragraph (2), referred to in the quoted text, has no application to this case.

The Attorney General of Texas, joined by the other state attorneys general in their briefs, argues that the state has the power to regulate the deceptive advertising of fares by airlines, and that federal law does not preempt his right to enforce state law. He contends that section 105 only preempts state regulations relating to the rates, routes or services of airlines, but does not expressly preclude state regulations relating to all airline operations. He maintains that state regulation of deceptive fare advertising by airlines does not relate to rates, routes or services. Attorney General Mattox argues that the legislative history of section 105 does not indicate congressional intent to preempt state regulation of deceptive fare advertising by airlines. Such regulation by the states protects the competitive functioning of the market place, he contends, and was not within the scope of state regulations that Congress intended to preempt.

The airlines respond that section 105 preemption applies to all laws "relating to rates, routes, or services" of airlines, and that the advertising of fares by airlines clearly relates to rates. Thus, the airlines argue that the district court correctly enjoined the state attorneys general from enforcing the various state laws. In addition, they note that section 411 of the Act, 49 U.S.C.App. § 1381, empowers DOT to regulate "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

B.

In our discussion we refer to the sections of the Act by their presently codified numbers. We conclude that state laws

proscribing deceptive advertising are preempted by § 1305(a)(1) when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Neither the Supreme Court nor any court of appeals has decided this precise issue. Two courts of appeals, however, have found express preemption of certain aspects of airline operations. See *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir.1989) and *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir.1989). These courts of appeals have particularly relied upon the Supreme Court's construction of section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA) which preempts all state laws "insofar as they . . . relate to any employee benefit plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). In *Shaw* the Court concluded that Congress used "relate to" in the broad sense and that any law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-98, 103 S.Ct. at 2899-2901.

Illinois Corporate Travel was an action brought by a travel agent against American Airlines, in which the travel agent asserted a federal antitrust claim and three state law claims. One of the state law claims was based on the Illinois Consumer Fraud and Deceptive Business Practices Act, and the others were based on common law. 889 F.2d at 752, 754. The travel agent had advertised that it offered discounts on American's tickets, and American attempted to stop such discount price advertising by denying the travel agent access to the plate used to issue tickets for the airline and by informing other airlines that it would not accept tickets that the travel agent wrote using their plates. American also issued an addendum to the agreement all travel agents must sign forbidding those selling its tickets to advertise that they offer discounts. *Id.* at 752.

The Seventh Circuit affirmed the district court's decision to dismiss two of the state law claims because they were preempted by § 1305(a)(1). Noting the Supreme Court's observations in *Shaw*, the court stated, "Price advertising surely 'relates to' price; the 'relating to' language in § 1305(a)(1) substantially increases the extent of preemption." *Id.* at 754. The court also disposed of the travel agent's argument that the language in § 1506 (the "savings clause") preserved the state law claim. The court held that this section preserves state law claims from implicit preemption, but not from express preemption. If a state law relates to "rates, routes, or services," it is preempted; "the absence of contrary federal law is irrelevant." *Id.*

In *New England Legal Foundation*, the court of appeals reversed a district court decision that the state authority could enact a landing fee scheme that created great disparity between user fees charged smaller and larger aircraft. 883 F.2d at 175. There were many issues in the case, but its outcome turned on the determination of DOT's role after deregulation and the application of § 1305(a)(1). Administrative proceedings were begun before an ALJ prior to institution of the district court action. DOT and the district court reached contrary conclusions concerning the validity of the landing fee scheme. *Id.* at 171.

The court of appeals concluded that DOT had primary jurisdiction and that the district court should have deferred to DOT's interpretation of § 1305(a)(1). The court noted that the CAB's regulatory responsibilities that survived deregulation were assigned to DOT, and stated:

> In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation. Congress expressly preempted state and local regulation by enacting §

> 105(a), which specifically provides that "no state or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier. . . ." 49 U.S.C.App. § 1305(a).

Id. at 173. The court concluded that the landing fee scheme was preempted by § 1305(a)(1). *Id.* at 175.

In addition, without referring to *Shaw*, this court and other courts of appeals have found express preemption under § 1305(a)(1).

This court concluded in *O'Carroll v. American Airlines*, 863 F.2d 11 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989) that § 1305(a)(1) preempted state law claims for damages by a passenger who was excluded from a flight after creating a disturbance on a plane. The court found that this section expressly preempted the state laws relied upon by the plaintiff, thus making consideration of implied preemption unnecessary. *Id.* at 13.

Two courts have found that § 1305(a)(1) preempted state laws concerning the treatment of handicapped passengers. In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir.1984), the court of appeals affirmed a directed verdict for the airline on a blind passenger's state law claims for discrimination in seating. The court found that state anti-discrimination laws were preempted as "relating to" services within the meaning of § 1305(a)(1). *Id.* at 1415. Accord *Anderson v. USAir*, 818 F.2d 49 (D.C.Cir.1987).

C.

The attorneys general cite three recent decisions by federal district courts concerning state regulation of the advertising of fares by airlines: *New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y.1989); *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal.1989); and *Kansas v. Trans World Airlines*, 730 F.Supp. 366

(D.Kan.1990). In each case, the state attorney general filed a state court suit against the airline, alleging that the airline's advertising of fares violated state deceptive practices laws. The airline removed the case to federal court. Then, the attorney general moved to remand the action to state court, and the district court granted the motion.

In *New York*, the court found that § 1305(a)(1) does not expressly preempt the State's enforcement of its deceptive practice laws concerning airline advertising. 728 F.Supp. at 176. The court concluded that any relationship between New York's enforcement of its laws against deceptive advertising and an airline's rates, routes and services is remote and indirect. *Id.* at 176. The court expressed concern that a finding that § 1305(a)(1) preempted New York law might "doom every state regulation affecting airlines." *Id.* at 176.

The district court in *California* made the following observation:

> In the instant case, plaintiff [state attorney general] could not bring an action under the Federal Aviation Act or its counterparts to enjoin the alleged false advertising. It appears from the statute that only the Administrator of the FAA may institute a civil action against an airline for a violation of the statute. See 49 U.S.C.A.App. § 1471. In fact, the whole contention of defendant [airline] is that the Department of Transportation (DOT) has sole authority to enforce alleged unfair advertising. Assuming arguendo that state regulation of airline advertising were preempted, since the Federal Aviation Act gives plaintiff no cause of action, plaintiff may bring a suit to enforce its alleged right in state court, and such a case "arises under" state law only. *See Franchise Tax Board,* [*v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], *supra.*

California, 720 F.Supp. at 828.

In *Kansas*, the court found:

> TWA has not met its burden of demonstrating clear congressional intent to make cases such as the present one removable. The court finds that the language of the preemption section precluding state regulation "relating to rates, routes or services" does not by its terms include advertising. [Citation omitted]. The Court accordingly finds that the Act does not provide a basis for removal under the "complete preemption" exception to the well-pleaded complaint rule. [Citation omitted].

Kansas, 730 F.Supp. at 368.

In addition, the attorneys general rely on *People v. Western Airlines*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal.Ct.App.1984), *cert. denied*, 469 U.S. 1132, 105 S.Ct. 815, 83 L.Ed.2d 808 (1985). There the court noted that Congress had granted the CAB broad authority to regulate unfair competition and deceptive practices by airlines, but the court concluded that there was no inherent conflict between this authority and California's enforcement of its false advertising laws against interstate air carriers. 202 Cal.Rptr. at 238-39. This decision appears to turn on a finding of no implied preemption, rather than an examination of § 1305 to determine whether Congress had expressly preempted the state law action.

Also, the attorneys general cite *Nader v. Allegheny Airlines*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), in which the Court held that a common-law tort action for fraudulent misrepresentation was not preempted by reason of the CAB's authority over "deceptive practices" under § 1381. However, *Nader* was decided prior to the addition of § 1305 to the Act. Thus, there was no basis for a finding of express preemption at the time of the decision.

D.

Unlike the district courts in *New York, California* and *Kansas*, we believe the history of federal legislation regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only. See discussion of remand in relation to Pan Am in Part V, *infra*. From the Civil Aeronautics Act of 1938 until the Deregulation Act of 1978, Congress gave the CAB vast powers of economic regulation over the airline industry, including the regulation of rates, routes and services. See 52 Stat. 973 (1938); 72 Stat. 731 (1958); 92 Stat. 1705 (1978). The Deregulation Act restricted the CAB's authority to regulate some of these areas. In changing the longstanding role of the CAB, Congress acknowledged that these changes could cause confusion concerning federal and state roles in airline regulation. Specifically, the House Committee on Public Works and Transportation observed that the Deregulation Act lacked specific provisions concerning state and federal jurisdiction over airlines, and thereby created "uncertainties and conflicts" in this regard. H.R.Rep. No. 1211 at 15-16; 1978 U.S.Code Cong. & Admin.News at 3751. By including § 1305 in the Deregulation Act to preempt state regulation of airline routes, rates or services, Congress hoped to "prevent conflicts and inconsistent regulations." H.R.Rep. No. 1211 at 16; 1978 U.S.Code & Cong. & Admin.News at 3752.

Subsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising. Since the enactment of the Deregulation Act, Congress has retained § 1305. Through the Sunset Act of 1984, Congress transferred to DOT the CAB's power to control unfair or deceptive trade practices under § 1381. 49 U.S.C.App. § 1551(b)(1)(E). In so doing, Congress intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. The

House Committee on Public Works and Transportation stated that "federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

Given the history of congressional concern and the inclusion of specific preemption language in the Deregulation Act, we agree with the Seventh Circuit in *Illinois Corporate Travel* that airline fare advertising "relates to" rates within the meaning of § 1305(a)(1). Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject. 463 U.S. at 96-97, 103 S.Ct. at 2899-2900. It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by § 1305(a)(1).

The attorneys general remind us that § 1506, which preserves remedies that exist at common law and by state statute, also survived the Sunset Act. They contend that this provision enables them to enforce their states' deceptive advertising laws as an additional remedy to those provided by the Act. However, in a case involving the express preemption of airline services, this court found that § 1305 clearly indicated congressional intent to preempt and controlled over a state law claim submitted under § 1506. *O'Carroll*, 863 F.2d at 13. In the present case involving the advertising of fares by airlines, we follow the reasoning in *O'Carroll* and agree with

the Seventh Circuit in *Illinois Corporate Travel*; § 1506 does not preserve state law remedies when there is express preemption under § 1305. See *Hingson*, 743 F.2d at 1416 n. 11.

In summary, we believe it is clear that by enacting §1305 Congress intended to retain in the federal government, exclusive authority over airline advertising of fares. It is not as though Congress had left a vacuum which the states needed to fill in order to protect their citizens. The provisions of the Act under which the CAB regulated unfair or deceptive practices of airlines, particularly § 1381, were neither terminated nor transferred to other agencies; they were transferred by operation of law to DOT. Thus, DOT inherited the CAB's role under § 1381 with respect to unfair and deceptive practices. With the advent of deregulation and the demise of the CAB, Congress continued to vest authority over such practices in a federal agency. Congress provided for its concern that consumers of airline services be protected under a uniform system of regulation by adding § 1305. This express preemption provision was intended "to prevent conflicts and inconsistent regulations" concerning airline advertising of fares, which relates to rates within the meaning of the provision.

Having concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising, we do not reach the parties' arguments concerning implied preemption.

III.

The attorneys general also argue that the airlines failed to meet the burden of proving the requirements for granting a preliminary injunction and, therefore, the district court abused its discretion by issuing the preliminary injunction against enforcement of the various state laws. As we have indicated, enforcement actions by the states are preempted; thus, the

airlines have demonstrated a substantial likelihood of success on their claim for a permanent injunction. Likelihood of success is the first requirement for granting a preliminary injunction. The other three requirements are: (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the one seeking the injunction outweighs any damage it may cause the other party; and (4) that the injunction will not be against the public interest. *Plains Cotton Coop. Ass'n v. Goodpasture Computer Service*, 807 F.2d 1256, 1259 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S.Ct. 80, 98 L.Ed.2d 42 (1987). Under the facts of this case we believe the finding with respect to likelihood of success carries with it a determination that the other three requirements have been satisfied.

Congress has exercised its authority under the Commerce Clause to regulate airlines and by adopting § 1305 has chosen to preempt all enforcement of state laws relating to rates, routes or services of airlines. Congress has declared that it is in the public interest for a federal agency to guard against unfair or deceptive practices by airlines. If the states were permitted to enforce their various laws, the airlines would be subjected to the demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations. This would cause irreparable injury by depriving the airlines of a federally created right to have only one regulator in matters pertaining to rates, routes and services. The appellants miss the thrust of the airlines' argument by contending that the only threatened injury is a loss of revenue, which is not irreparable. We conclude that permitting states to regulate airline advertising in the face of the preemption language of § 1305(a)(1) would violate the Supremacy Clause, causing irreparable injury to the airlines. Therefore, the second requirement for an injunction is satisfied.

With regard to the third requirement, there is no injury to the states to weigh against that which they threaten to inflict on the airlines. Since Congress expressly preempted this area of regulation, the states are not injured by the injunction.

Finally, the fourth requirement is satisfied by the finding of Congress that exclusive federal regulation in matters relating to airline rates, routes or services is in the public interest.

We conclude that the airlines met their burden of proving the four requirements and the district court properly issued the preliminary injunction.

IV.

In number 89-1509 the attorneys general of thirty-three states[1] appeal from the order of the district court broadening the preliminary injunction to include them and permitting the airlines to name and serve them as additional defendants in the pending action against the Attorney General of Texas. The Attorney General of Texas also appeals from this order.

A.

A brief outline of the background and participation of these attorneys general in the *TWA v. Mattox* litigation is in order.

In June 1987, as a result of a resolution co-authored by the Attorney General of Texas, the NAAG appointed a task

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1 Kansas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

force to study the advertising and marketing practices of the airline industry in the United States.

In a letter dated October 19, 1987, DOT informed the Attorney General of California that a number of the proposed NAAG guidelines concerning airline advertising appeared to be preempted by federal law.

In December 1987, the NAAG adopted the guidelines. On February 3, 1988, the attorneys general of Texas and six other states wrote several airlines threatening "protracted litigation" to bring their advertisements into compliance with the guidelines. In a March 2, 1988, letter from DOT to the Attorney General of Texas, DOT stated that state regulation of fare advertising by airlines, as set forth in the guidelines, was preempted by federal law.

On November 14, 1988, the Attorney General of Texas sent a letter to Plaintiffs TWA, Continental and British Air on behalf of the states of California, Massachusetts, New York, Texas and Washington. The letter stated that it was the position of the states that any fuel tax or other surcharge to air fare must be included in the total advertised price. The attorneys general indicated an intent to sue the airlines under their respective state laws.

TWA, Continental and British Air commenced this action against the Attorney General of Texas on January 23, 1989, and moved for a temporary restraining order (TRO). On January 24, 1989, the Attorney General of Texas notified four states of the suit and advised them that the suit could restrict all states from enforcing their laws against airlines. Other states were also informed.

On January 27, 1989, the date of the hearing on the TRO, thirty-three states filed a motion, which reads in pertinent part:

> Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Order
>
> Without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them, the states of Kansas, Alaska, . . . Wyoming specially appear before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order or in the alternative to ask this Court to set a future date upon which to hear plaintiffs' motion as a noticed motion for temporary restraining order.

The attorneys general stated in their motion that they had been "informed" that the airlines were seeking a TRO "that could have the effect of prohibiting such states from enforcing their own laws even though they were not named as defendants nor served by plaintiffs with a copy of the action currently before this Court."

The Attorney General of Kansas then participated in the TRO hearing. After the Assistant Attorney General of Texas had argued against entry of a TRO, the Attorney General of Kansas addressed the court. He stated that he appeared for the purpose of responding on behalf of thirty-four state attorneys general. He argued that the other attorneys general were not responsible for the individual actions of the states of Texas and Kansas under those states' consumer protection laws—attorneys general cannot act in concert with one another except to the extent their laws are similar. He argued that since each state acted individually to enforce its laws, the states could not be sued collectively "unless there's something that would bring the state under the umbrella of some kind of federal action. And states don't set rates, rules and regulations. . . . The bottom line . . . is that individual states should not be precluded in advance as they consider enforcement of their state law in their state court."

The district court denied motions to stay and on January 30, 1989, issued the preliminary injunction prohibiting the Attorney General of Texas from initiating any enforcement action to regulate the advertising of fares by TWA, Continental or British Air. Attorney General Mattox appealed on February 10, 1989 (No. 89-1142). On February 14, 1989, the Attorney General of Kansas filed a motion to clarify the injunctive order. He requested the court to enter a "Substituted Order," which he attached to the motion. On February 27, 1989, the district court entered an order granting the Kansas motion. It stated:

> The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the State of Texas.

On March 16, 1989, TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who "specially appeared" in the TRO hearing in January. On March 29, 1989, ten additional airlines filed a motion for leave to intervene. Copies of the motions to broaden the preliminary injunction and to permit additional airlines to intervene were sent to the Attorneys General of Texas and Kansas. Neither motion was served on any of the attorneys general of the other thirty-two states.

On April 4, 1989, the Attorney General of Kansas filed a response denying that the district court had subject matter or personal jurisdiction over him.

On April 27, 1989, the district court filed an order broadening the preliminary injunction to include the attorneys

general of the other thirty-three states. Also, the court granted the motions of the ten other airlines to intervene as plaintiffs.

The district court noted that since the injunction was issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am.

The district court granted the plaintiffs leave to amend their complaint to include those attorneys general who, acting in concert with Attorney General Mattox or among themselves, were attempting to use state law to enforce the NAAG guidelines relating to airline advertising. This injunction operates prospectively and does not act to interfere with the four cases mentioned above.

B.

Unlike subject matter jurisdiction, jurisdiction over the person can be waived. *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir.1985). The *Cactus Pipe* court adopted the following statement made in *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir.1972), "If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Cactus Pipe*, 756 F.2d at 1108. In *Rauch v. Day & Night Mfg. Corp.*, the court stated that a court can acquire jurisdiction over a nonresident only by actual service within the jurisdiction "*or by his waiver, by general appearance or otherwise, of the want of due service.*" 576 F.2d 697, 700 (6th Cir.1978) (quoting *Goldey v. Morning News*, 156 U.S. 518, 521, 15 S.Ct. 559, 560, 39 L.Ed. 517 (1895)) (emphasis in original).

In the present case the plaintiffs filed suit only against the Attorney General of Texas. Although they sought a TRO against the defendant and "any person in active concert or participation with him," the only relief prayed was from enforcement actions "under the laws of the state of Texas." The complaint and motion for an injunction did not seek to enjoin the enforcement of any laws but those of Texas. The other thirty-three attorneys general joined the Attorney General of Texas in asking the district court to deny the injunction. At that time, they had neither been named defendants nor served with process. They stated that they filed the motion because they had been informed, presumably by the Attorney General of Texas, that the plaintiffs were seeking an injunction that would interfere with the enforcement of their states' laws.

The record does not support this conclusion. The airlines' motion for a TRO referred to the actions of the NAAG in promulgating the guidelines, but sought relief only against Texas. Nevertheless, the attorneys general of thirty-three other states filed a motion asking the district court to deny the airlines' motion for a TRO against enforcement of Texas laws. Although they described themselves as "specially appearing," the attorneys general sought an affirmative act by the court that would benefit their states. The fact that they sought affirmative relief controls, not the form of their appearance, for the distinction between general and special appearances no longer exists in federal courts. A party may appear generally and yet object to personal jurisdiction at any time before the answer is filed or in the answer. *Grammenos*, 457 F.2d at 1070; Fed.R.Civ.P. 12(h). The thirty-three attorneys general were not parties, however, when they filed their motion. They had no basis for objecting to the court's jurisdiction as they had not been named defendants and no attempt had been made to bring them before the court by process.

It appears to us that the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf. At that point it was irrelevant that the thirty-three attorneys general had not been sued or served; they chose to take part in the pending action as if they were parties. True, they did not seek to intervene under Fed.R.Civ.P. 24. On the other hand, they did not appear as amici curiae. Without being required to do so, they came voluntarily into court and joined with the Attorney General of Texas in seeking dismissal of the injunctive action. The arguments made by the Attorney General of Kansas on behalf of Texas and the other thirty-three states went to the heart of the issue before the district court. We believe the thirty-three attorneys general waived any objection to the jurisdiction of the court over their persons as representatives of their respective states. Thus, we affirm the order broadening the preliminary injunction to include the attorneys general of the thirty-three states and permitting the plaintiffs to amend their complaint to name and serve those attorneys general as additional defendants.

V.

In number 89-1610, the attorneys general of Texas and thirty-three other states appeal from the district court order that permitted the intervention of Pan Am as a plaintiff and broadened the scope of the preliminary injunction to include Pan Am. They argue that the complaint filed against Pan Am in state court by the Attorney General of Texas raised only state law issues and presented no federal question. As a result, the District Court for the Northern District of Texas lacked subject matter jurisdiction and erred in permitting removal, denying the Texas motion to remand to state court and transferring the case to the District Court for the Western District of Texas. They further assert that due to the lack of

subject matter jurisdiction, the Western District erred in consolidating this action with that of *TWA v. Mattox*, granting Pan Am's motion to intervene as a plaintiff, and in broadening the preliminary injunction to include Pan Am.

Ordinarily, the existence of a federal question for removal purposes is determined according to the "well-pleaded complaint" rule. Under that rule, removal cannot be based on the existence of a federal defense. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). As the Court noted in *Taylor*, however, Congress may so completely preempt a particular area, that "any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64, 107 S.Ct. at 1546-1547. It has long been recognized that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, has such preemptive force. In *Taylor*, the Court found that ERISA's preemption provision is similarly so strong that every claim for benefits under a covered plan is regarded as arising under the laws of the United States. This determination was based on "the clearly manifested intent of Congress." *Id.* at 67, 107 S.Ct. at 1548.

An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" as to preclude state court actions. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation*, 883 F.2d at 173. Congress made this clear by including the express preemption provision in the Deregulation Act. The legislative history of § 1305 exhibits a

congressional intent to treat a complaint raising "this select group of claims" as "necessarily federal in character." See *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546-1547. The complaint filed against Pan Am in state court by the Attorney General of Texas alleged that Pan Am had violated the Texas Deceptive Trade Practices Act through deceptive advertising of air fares. This claim relates to airline rates within the meaning of § 1305(a)(1) and is federal in character; therefore, we conclude that there is federal question jurisdiction.

In addition, we conclude that the Western District properly permitted Pan Am to intervene as a plaintiff pursuant to Fed.R.Civ.P. 24(b)(2). Pan Am's defense that the enforcement action of the Attorney General of Texas under the Texas Deceptive Trade Practices Act is preempted by §1305(a)(1) presents a question of law in common with that relied upon by the other plaintiff airlines in this case.

Finally, we find that the Western District properly broadened the scope of the preliminary injunction to include Pan Am. However, this injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. Therefore, the preliminary injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

Conclusion

To summarize, we affirm the order of the district court in number 89-1142. The court issued a preliminary injunction that forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, which would seek to regulate the advertising of fares by plaintiffs TWA, Continental and British Air. The court later clarified this

injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas.

In addition, we affirm the order of the district court in number 89-1509. Through this order, the court granted the motions of ten other airlines to intervene as plaintiffs. The court also granted plaintiffs TWA, Continental and British Air permission to amend their complaint and to add as defendants the attorneys general of thirty-three other states. And, the court broadened the preliminary injunction to include the attorneys general of the other thirty-three states. This broadened injunction operates prospectively and does not affect similar suits that had been filed by the Attorney General of Texas against Pan Am and the Attorneys General of California, Kansas and New York against TWA.

Finally, we affirm the order of the district court in number 89-1610. The court granted Pan Am's motion to intervene in number 89-1142 and broadened the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The preliminary injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. As a result, the injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and after careful consideration of the Complaint, Plaintiffs' Motion for and Memorandum in Support of a Temporary Restraining Order, the opposition thereto, and the arguments of counsel, and after notice to and appearance in open Court by the Defendant, the Court finds that Plaintiffs will suffer immediate and irreparable injury if the Attorney General of the State of Texas or parties in concert or participating with him are permitted to bring an enforcement action against Plaintiffs, or any of them, pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other state law, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other promotional and informational advertising. The Court finds that it is probable that: Plaintiffs will prevail in establishing their claims that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been preempted by the Federal Government; subsection 2.5 of the NAAG Guidelines, which purportedly requires that "[a]ny

fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and the threatened enforcement action by Attorney General Mattox and others in concert or participating with him would be in violation of the Supremacy Clause of the United States Constitution. The Court further finds it unnecessary to determine the probability that the Plaintiffs will demonstrate that the threatened implementation or enforcement of the NAAG Guidelines through state law, including enforcement of the Guidelines by Attorney General Mattox through Tex. Bus. & Comm. Code §§17.41 et seq., or others in concert or participating with him through their respective state statutes, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the Constitutional prohibition against interstate compacts that intrude into the federal domain (Art. 1, §10, cl. 3, U.S. Constitution); and violates Plaintiffs' First Amendment rights. In addition, the Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendant and would, in fact, be in the public interest. Accordingly,

It is hereby ORDERED that Plaintiffs' Motion for Preliminary Injunction be and hereby is GRANTED.

It is further ORDERED that the Attorney General of the State of Texas, Jim Mattox, individually and in his official capacity, and all other persons acting for the Attorney General in either capacity, and all other persons acting in concert or participation with Attorney General Mattox or on his behalf, and all other persons having actual knowledge of this Order, be and hereby are ENJOINED from:

> initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the

operations involving their rates, routes and/or services.

It is further ORDERED that Plaintiffs shall give security in the amount of $10,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the Court or by the Clerk of the Court.

SIGNED this 30th day of January, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS, PLC, Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Came on this date to be considered the motion of the Honorable Robert T. Stephan, Attorney General of the State of Kansas, to clarify and substitute this Court's Order granting a preliminary injunction in the above-styled and numbered case. The Court, having reviewed the motion, is of the opinion it is meritorious and should be granted. It is, therefore,

ORDERED that the Motion to Clarify and Substitute filed by the Attorney General of the State of Kansas be and hereby is GRANTED. The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the state of Texas.

SIGNED this 23rd day of February, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS, PLC, Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Came on to be considered in the above-styled cause the Motion of Certain Air Carriers for Leave to Intervene and Plaintiffs' Motion to Broaden the Injunction issued by this Court. The Court, having reviewed both motions and the responses thereto, has determined that both motions are meritorious and should be granted.

This suit was originally filed by Plaintiffs Trans World Airlines, Inc., ("TWA"), Continental Airlines, Inc., ("Continental"), and British Airways PLC ("British Airways") against Jim Mattox, the Attorney General of the State of Texas. The Plaintiffs seek injunctive and declaratory relief, based upon the Attorney General's attempt to file suit against the airlines under the Texas deceptive trade practices act. The dispute centers around the advertising practices of the airlines, which the Attorney General claims are violative of Texas law. The airlines claim this issue has been preempted by federal law.

The original injunction issued by this Court protected only the named Plaintiffs against actions brought by the Attorney General of Texas under Texas law which regulate or restrict air fare advertising or operations involving rates, routes and/or services.

Since the injunction was issued by this Court on January 30, 1989, the Attorneys General of California, Kansas and New York have filed suit against Plaintiff TWA on the same grounds--seeking to force the airline to comply with state advertising regulations. Attorney General Mattox has filed suit on identical grounds in the 101st District Court of Dallas County, Texas against Pan American World Airways, Inc. ("Pan Am"), which has also requested leave to intervene in the present action.

Attorney General Mattox, not satisfied with attempting to regulate domestic air carriers, has also threatened legal action against foreign air carriers, including Lufthansa German Airlines ("Lufthansa"). The letter from Attorney General Mattox which threatens enforcement against Lufthansa also purports to be sent on behalf of the States of California, Massachusetts, New York, and Washington. As a result of these threats, Lufthansa, along with Air Canada, Compagnie National Air France ("Air France"), Alitalia-Lines Aeree Italiane, S.P.A. ("Alitalia"), El Al Israel Airlines, Ltd., ("El Al"), Finnair, Japan Air Lines Company, Ltd., ("JAL"), Qantas Airways, Ltd., ("Qantas"), Scandinavian Airlines System ("SAS"), and Viacao Aerea Rio-Grandense ("Varig"), have requested leave to intervene.

In addition, the Plaintiffs to this action request the Court to broaden its injunction to include the thirty-three states who have "specially appeared" in this action.

I. Motion to Intervene by Foreign Air Carriers

A. Intervention as a Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that no statute confers an unlimited right to intervene in this action. As such, the parties must meet the requirements for intervention of right under 24(a)(2), which requires the following:

(1) the application for intervention must be timely;

(2) the applicant must have an interest relating to the property or transaction which is the subject of this action;

(3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;

(4) the applicant's interest must be

> inadequately represented by the existing parties to the suit.

New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452, 463 (5th Cir. 1984) (en banc), citing International Tank Terminals, Ltd. v. M/V Acadia Forest, 579 F.2d 964, 967 (5th Cir. 1978).

1. Timeliness

Timeliness of intervention is determined from a review of all the circumstances. NAACP v. New York, 413 U.S. 345 (1973). The Fifth Circuit has established four factors to be considered by the Court in determining the timeliness of a petition for leave to intervene:

> Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Lelsz v. Kavanaugh, 710 F.2d 1040, 1043 (5th Cir. 1983).

In the present action, the petition for leave to intervene was filed only two months after the main suit was filed, and only three months after Lufthansa learned of the threatened legal action by Attorney General Mattox. Although not specifically outlined in the Intervenor's response, the Court finds that there was no significant delay between the time the Intervenors knew or reasonably should have known of their interest in the suit and the time the petition for leave to intervene was actually filed. As such, the Intervenor's petition is timely.

Even if a two-to-three month delay is considered not timely, the existing parties will suffer no prejudice for failure of the Intervenors' to file their petition earlier. There are no existing suits filed against the Intervening parties, nor does their intervention in any way limit any existing rights of the Attorney General of the State of Texas. There is no evidence of any potential prejudice to the existing parties to the litigation.

On the other hand, the Intervenors will suffer great prejudice if not allowed to intervene. Attorney General Mattox has threatened suit against Lufthansa and could initiate suit against any of the other Intervenors at any time. The Intervenors are faced with great prejudice if not allowed to intervene.

Critical to this inquiry is adequacy of representation. See Lelsz v. Kavanaugh, 710 F.2d 1040 (5th Cir. 1983). "If the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight." Id. at 1046. Here, the proposed intervenors' interests are not adequately represented. The proposed intervenors raise issues similar, but not identical to, those raised by the Plaintiffs. The laws related to foreign air carriers involve issues not pertinent to domestic air carriers.

As to Factor 4, there have been identified no unusual circumstances militating against a determination that the petition is timely. After a review of the facts as related to the above factors, the Court determines that the Intervenor's petition for Leave to Intervene was timely filed.

2. Interest

The Intervenor must demonstrate an "interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2). An applicant for intervention need not be legally bound by the result of the main case, nor need his interest be identical to those claims asserted in the main action. New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452 (5th Cir. 1984) (en banc). However, intervention of

right does require a "direct, substantial, legally protectable interest in the proceedings." Id. at 463.

The Intervenors have exhibited such an interest in the present proceedings. If not permitted to intervene, they will be exposed to suit on grounds prohibited by the injunction issued by this Court. Further, the claims presented by the foreign air carriers, although not identical to those presented by the Plaintiffs in this suit, are sufficiently similar to establish a direct and substantial interest in these proceedings.

3. Protection of Interest

This third factor requires the applicant to establish that the disposition of the main action may impair or impede his ability to protect his interest in the subject matter of the action, which is demonstrated by the possibility of suit being filed against the prospective intervenors if not brought under the protection of this Court's injunction.

4. Adequacy of Representation

Finally, as stated previously, the Court has determined that the existing parties to the suit will not adequately represent the interests of the proposed intervenors. The specific issue as to whether an action can be brought under state law to regulate the advertising practices of a foreign air carrier will not be presented absent grant of leave to intervene.

B. Permissive Intervention

Even if intervention as of right under 24(a) is not mandated, then permissive intervention should be granted under Rule 24(b). This Rule provides:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties.

The proposed intervenors have established the existence of a question of law in common with those presented in the main action – specifically whether federal law preempts in the area of regulation of airline advertising. The main issue which prevents the intervenors' rights from being adequately represented by the Plaintiffs is the fact that the intervenors are foreign rather than domestic air carriers. Although federal law is substantially similar as it applies to both classes of air carriers, there are differences which will not be addressed absent intervention by the foreign air carriers.

In light of the preceding, the Motion of Certain Air Carriers for Leave to Intervene is **GRANTED**.

II. Motion to Broaden Injunction

The Plaintiffs seek to broaden the scope of the injunction issued by this Court on three grounds:

1) the evidence that other state attorneys general are acting "in concert" with Attorney General Mattox;

2) the attorneys general of thirty-three states have de facto intervened in this proceeding; and

3) the actions taken by various state attorneys general since this Court's preliminary injunction order threatens the Plaintiffs and this Court's jurisdiction.

Since this Court issued its preliminary injunction order, four additional suits have been filed against two air lines under other state laws in an attempt to regulate the airlines' advertising of their rates, routes and services:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.

2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.

3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.

4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

In light of these developments and upon further consideration of the issues in this action, the Court has determined that the injunction presently in effect must be broadened in order to provide meaningful protection to the Plaintiff airlines. The suits initiated in other states on identical grounds and against the same parties demonstrate to the Court that this matter is not merely of local interest, but rather one that is of nationwide concern. Decisions made in the course of these proceedings have the potential of effecting broad-sweeping changes in the airline industry.

The scope of this matter, clearly, is not limited to the activities of the Attorney General of Texas, but includes all Attorneys General involved in enforcing the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"). Therefore, the Court's injunction will be broadened to include not only Attorney General Mattox, but those State Attorneys General, acting in concert with Attorney General Mattox, or with each other, to enforce the NAAG guidelines through state law actions.

Failure to include these additional Defendants will seriously impair the ability of this Court to render a meaningful decision over the issue of whether federal law preempts state action in the matter of airline advertising. There is also a real possibility that the Plaintiff airlines will be subjected to a multiplicity of suits in various jurisdictions, thereby depriving this Court of the ability to offer any meaningful protection to the Plaintiffs. Despite the Plaintiffs' assertions that the additional Attorneys General be deemed intervenors, the Court has determined that the proper method of joinder is through Federal Rule of Civil Procedure 19.

Accordingly, it is **ORDERED** that Plaintiffs are hereby **GRANTED** leave to amend their complaint to include those Attorneys General who, acting in concert with Attorney General Mattox or among themselves, are attempting to use state law to enforce the NAAG guidelines relating to airline advertising within ten (10) days from the entry of this Order.

Prior to the addition of said Defendants as parties to this action, the Court's injunction will be broadened to include the following:

Hon. Grace Berg Schaible
Attorney General of Alaska

Hon. Robert K. Corbin
Attorney General of Arizona

Hon. Steve Clark
Attorney General of Arkansas

Hon. John Van De Kamp
Attorney General of California

Hon. Duane Woodward
Attorney General of Colorado

Hon. Clarine Nardi Riddle
Deputy Attorney General
(Acting Attorney General of Connecticut)

Hon. Robert Butterworth
Attorney General of Florida

Hon. Jim Jones
Attorney General of Idaho

Hon. Neil F. Hartigan
Attorney General of Illinois

Hon. Tom Miller
Attorney General of Iowa

Hon. Robert T. Stephan
Attorney General of Kansas

Hon. James E. Tierney
Attorney General of Maine

Hon. J. Joseph Curran, Jr.
Attorney General of Maryland

Hon. James M. Shannon
Attorney General of Massachusetts

Hon. Frank J. Kelley
Attorney General of Michigan

Hon. Hubert H. Humphrey, III
Attorney General of Minnesota

Hon. William L. Webster
Attorney General of Missouri

Hon. Robert M. Spire
Attorney General of Nebraska

Hon. Brian McKay
Attorney General of Nevada

Hon. Robert Abrams
Attorney General of New York

Hon. Lacy Thornberg
Attorney General of North Carolina

Hon. Nicholas Spaeth
Attorney General of North Dakota

Hon. Anthony J. Celebrezze, Jr.
Attorney General of Ohio

Hon. Robert Henry
Attorney General of Oklahoma

Hon. Dave Frohnmayer
Attorney General of Oregon

Hon. James E. O'Neil
Attorney General of Rhode Island

Hon. Roger Tellinghuisen
Attorney General of South Dakota

Hon. Charles W. Burson
Attorney General of Tennessee

Hon. Jeffrey Amestoy
Attorney General of Vermont

Hon. Kenneth O. Eikenberry
Attorney General of Washington

Hon. Charles G. Brown
Attorney General of West Virginia

Hon. Don J. Hanaway
Attorney General of Wisconsin

Hon. Joseph B. Meyer
Attorney General of Wyoming

The Court has determined that each of the above has an interest relating to the subject of this action and are so situated that the disposition of this action in their absence will leave those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Federal Rule of Civil Procedure 19(a)(2)(ii).

This injunction will operate prospectively only and will not act to interfere with the following proceedings:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.

2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.

3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.

4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

The Court would hope that, considering the possibility of conflicting judgments in this case, these state court proceedings would be abated pending this Court's final determination of this matter.

IT IS SO ORDERED.

SIGNED this 26th day of April, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., et al., Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, et al. Defendant.	§	

ORDER

Came on this date to be considered the Motion of Pan American World Airways, Inc. ("Pan Am") for Leave to Intervene in the above-styled cause. The action pending against Pan Am in the United States District Court for the Northern District of Texas, Dallas Division, has been transferred to this Court and consolidated with the present action. The Court, therefore, has determined that the Motion to Intervene should be granted pursuant to Rule 24(b)(2), and that the protective order issued by this Court be broadened to include Pan Am.

IT IS SO ORDERED.

SIGNED this 26th day of May, 1989.

/s/ Walter S. Smith Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

SELECTED STATE STATUTES

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§ 17200 Unfair Competition; Law Governing

As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17203 Injunction; Orders or Judgments

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

§ 17500 False or Misleading Statements

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state,

in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

FLORIDA STATUTES 1989, CHAPTER 501

501.204 Unlawful Acts and Practices.

(1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

IOWA STATUTES

Iowa Code section 714.16 (1989)

2. *a.* The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any

merchandise, whether or not a person has in fact been misled, deceived, or damaged is an unlawful practice. . . .

MINNESOTA STATUTES

§ 325F.67 False Statement in Advertisement

Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public, for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, label, price tag, circular, pamphlet, program, or letter, or over any radio or television station, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, for use, consumption, purchase, or sale, which advertisement contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof, be guilty of a misdemeanor, and any such act is declared to be a public nuisance and may be enjoined as such.

The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney

general, and it shall be the duty of the county attorney of any county wherein a violation of this section shall have occurred, upon complaint is being made, to prosecute any person violating any of the provisions of this section.

§ 325F.69 Unlawful practices

Subdivision 1. **Fraud, misrepresentation, deceptive practices.** The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided herein.

NEBRASKA STATUTES
TRADE PRACTICES

87-302. Deceptive trade practices; enumerated. (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

(1) . . .

. . .

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) . . .

87-303. Deceptive trade practices; damages; injunction; costs; additional remedy. (a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. . . .

87-303.05. Attorney General; temporary restraining order; civil action; exceptions. (1) Whenever the Attorney General has cause to believe that a person has engaged in or is engaging in any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01, he may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice, or which may be necessary to restore to any other person any money or real or personal property which may have been acquired by means of any such practice.

NEW YORK STATUTES
GENERAL BUSINESS LAW

§ 349. Deceptive acts and practices unlawful

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm,

corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices states to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

§ 350. False advertising unlawful

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

§ 350-a False advertising

The term "false advertising" means advertising, including labeling, which is misleading in a material respect; and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

WASHINGTON STATUTES
UNFAIR BUSINESS PRACTICES - CONSUMER PROTECTION

19.86.020 Unfair competition, practices, declared unlawful. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

19.86.080 Attorney general may restrain prohibited acts —Costs—Restoration of property. The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful;

. . . .

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

WISCONSIN STATUTES

100.18 Fraudulent Representations

(1) No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employe thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate,

merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

100.20 Methods of Competition and Trade Practices

(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
} ss.:
COUNTY OF SAN DIEGO }

I am a citizen of the United States and a resident of or employed in the City of San Diego, County of San Diego; I am over the age of 18 years and not a party to the within action; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

On April 16, 1991, I served the within Petition of Thirty-One Attorneys General for Writ of Certiorari in re: Attorney General of California, et al. v. Trans World Airlines, Inc., et al., in the Supreme Court of the United States, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at San Diego, California, addressed as follows:

FULBRIGHT & JAWORSKI
RONALD D. SECREST
DAVID WILKS CORBAN
IRENE KOSTURAKIS
1301 McKinney Street
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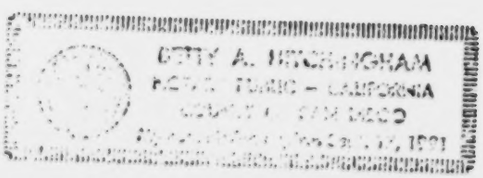
Attorneys for Respondents Trans World Airlines, et al.

JIM MATTOX
Attorney General of Texas
STEPHEN GARDNER
Assistant Attorney General
714 Jackson, Suite 700, Dallas, TX 75202
Attorney for Petitioner Jim Mattox

All other parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 16, 1991, at San Diego, California.

Alice L. Koenitzer
ALICE L. KOENITZER

Subscribed and sworn to before me on April 16, 1991.

Betty A. Hitchingham
BETTY A. HITCHINGHAM, Notary Public